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No. _____

Supreme Court, U.S.
FILED
MAR 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OWENS-ILLINOIS, INC., et al.,

Petitioners,

—v.—

BRUCE E. DANFIELD, et ux.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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* With the exception of the Third Circuit slip opinions appearing at 13a to 83a, all cases included in this Appendix were reprinted from opinions published in volumes of the official reporter system. For the convenience of the reader, page references to the West Publishing Co. reporter system appear in bold brackets as follows: [ ]. Since not part of the courts' official opinions, syllabi and headnotes are omitted.

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Evidence

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

INFORMATION REQUIRED BY UNITED STATES SUPREME COURT RULE 28.1

PETITIONERS OWENS-ILLINOIS, INC., *et al.*:

Armstrong World Industries, Inc.: This petitioner has no parent company; its affiliates and subsidiaries (other than wholly owned subsidiaries) are Forms + Surfaces, Inc. and ArmStar Venture Association.

The Celotex Corporation: This petitioner's parent company is Jim Walter Corporation. The Celotex Corporation has no affiliates or other than wholly owned subsidiaries.

Eagle-Picher Industries, Inc.: This petitioner has no parent company; it has no domestic affiliates or other than wholly owned subsidiaries. This petitioner has one West German subsidiary: Diehl & Eagle-Picher GmbH.

Fibreboard Corporation: This petitioner's parent company is Louisiana-Pacific Corporation. Fibreboard Corporation has no affiliates or other than wholly owned subsidiaries.

Keene Corporation: This petitioner's parent company is Bairnco Corporation. Keene Corporation's affiliates and subsidiaries (other than wholly owned subsidiaries) are: The Genlyte Group, Incorporated; Kasco Corporation and Shielding Systems Corporation.

Owens-Corning Fiberglas Corporation: This petitioner has no parent company; its affiliates and subsidiaries (other than wholly owned subsidiaries) are O.C. Birdair Corporation and Oregon Metallurgical Corporation.

Owens-Illinois, Inc.: 100% of this petitioner's shares are held by Kohlberg, Kravis, Roberts & Co. Petitioner's affiliates and subsidiaries (other than wholly owned subsidiaries) are: Owens-Illinois de Puerto Rico; Prudent Supply, Inc.; Emballages Laurent S.A. (France); Manufacturera de Vidrios Planos, C.A. (Venezuela); Kimble Italiana SpA (Italy); Papeteries d'Espaly (France) and Companhia Industrial Sao Paulo Erio (Brazil).

Pittsburgh Corning Corporation: 50% of this petitioner's shares are held by PPG Industries, Inc. and 50% of its shares are held by Corning Glass Works. This petitioner has no affiliates or other than wholly owned subsidiaries.

PETITIONER RAYMARK INDUSTRIES, INC.:

Raymark Industries, Inc.: This petitioner's parent company is Raytech Corporation; it has no domestic affiliates and other than wholly owned subsidiaries. This petitioner has one Japanese affiliate: Diaken RM.

SUPREME COURT OF THE UNITED STATES

No. A-504

OWENS-ILLINOIS, INC., ET AL.,

Applicant,

—v.—

BRUCE E. DANFIELD, ET UX.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 2, 1988.

s/ BYRON R. WHITE

Associate Justice of the Supreme Court of the United States

Dated this 28th day of
December, 1987

SUPREME COURT OF THE UNITED STATES

No. A-556

RAYMARK INDUSTRIES, INC.,

Applicant,

—v.—

BRUCE E. DANFIELD, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 2, 1988.

s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 21st day of
January, 1988

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

IN RE: Asbestos Litigation

No. 86-5236

Raymark Industries, Inc.,

Appellant.

No. 86-5237

Owens-Illinois, Inc., etc.,

Appellants.

No. 86-5370

Zelda F. Gregory, et al.

—vs.—

General Motors Corp.,

Appellant.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until March 2, 1988.

s/ WEIS

Circuit Judge

Dated: February 5, 1988

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 86-5236

IN RE:

Asbestos Litigation

RAYMARK INDUSTRIES, INC.,

Appellant.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 1, 1988.

s/ WEIS

Circuit Judge

Dated: November 30, 1987

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

IN RE: ASBESTOS LITIGATION

No. 86-5236

Raymark Industries, Inc.,

Appellant.

No. 86-5237

Owens-Illinois, Inc. etc.

Appellants.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 1, 1988.

s/ WEIS

Circuit Judge

Dated: November 18, 1987

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 86-5370

John W. Gregory and Zelda F. Gregory, his wife,
Zelda F. Gregory, etc.,

—vs.—

General Motors Corporation, etc.,
General Motors Corporation,

Appellant.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until February 1, 1988.

s/ WEIS
Circuit Judge

Dated: November 18, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5236

IN RE: ASBESTOS LITIGATION

Raymark Industries, Inc.,

Appellant.

IN RE: ASBESTOS LITIGATION

DANFIELD, ET AL.

—v.—

JOHNS-MANVILLE SALES CORP., ETC.,

Owens-Illinois, Inc., Keene Corporation, Pittsburgh-Corning Corporation, The Celotex Corporation, Armstrong Cork Company, Eagle-Picher Industries, Inc., Owens-Corning Fiberglas Corporation, and Fibreboard Corporation, Appellants in No. 86-5237

IN RE: ASBESTOS LITIGATION

JOHN W. GREGORY AND ZELDA F. GREGORY, HIS WIFE, ZELDA F. GREGORY, ADMINISTRATRIX AND ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF JOHN W. GREGORY, DECEASED; ZELDA F. GREGORY, INDIVIDUALLY; AND BRIAN GREGORY, A MINOR BY HIS NATURAL PARENT AND GUARDIAN ZELDA F. GREGORY

—v.—

GENERAL MOTORS CORPORATION, JOSEPH DOE, TOM DOE, HARRY DOE, ROBERT DOE, KEN DOE, DANIEL DOE, LARRY DOE, EDWARD DOE, SAM DOE, JACK DOE, FRED DOE, VINCE DOE,

General Motors Corporation, Appellant in No. 86-5370

(D.C. Civ. Nos. 82-4031 & 85-381)

SUR PETITION FOR REHEARING

Present:

GIBBONS, *Chief Judge*,
WEIS, BECKER, STAPLETON, MANSMANN, SCIRICA,
HUTCHINSON and HUNTER*, *Circuit Judges*.

The petitions for rehearing filed by defendant-appellant General Motors Corporation, and defendant-appellants Owen-Illinois, Inc., Keene Corporation, Pittsburgh-Corning Corporation, The Celotex Corporation, Armstrong World Industries, Inc., Eagle-Picher Industries, Inc., Owens-Corning Fiberglas Corporation, Fibreboard Corporation, and GAF Corporation in the above entitled cased [sic] having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petitions for rehearing are denied.

BY THE COURT,

s/ WEIS
Circuit Judge

Dated: November 2, 1987

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* As to panel rehearing only.

Judges Seitz, Higginbotham, Sloviter and Greenberg did not participate in the decision of this matter.

Judge Hutchinson would have granted rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5236, 86-5237 & 86-5370

IN RE: ASBESTOS LITIGATION

Raymark Industries, Inc.
Appellant in No. 86-5236

IN RE: ASBESTOS LITIGATION

DANFIELD, ET AL V. JOHNS-MANVILLE
SALES CORP., ETC.,

Owens-Illinois, Inc., Keene Corporation,
Pittsburgh-Corning Corporation,
The Celotex Corporation, Armstrong Cork Company,
Eagle-Picher Industries, Inc.,
Owens-Corning Fiberglas Corporation,
and Fibreboard Corporation,
Appellants in No. 86-5237

IN RE: ASBESTOS LITIGATION

JOHN W. GREGORY AND ZELDA F. GREGORY, HIS WIFE, ZELDA F. GREGORY, ADMINISTRATRIX AND ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF JOHN W. GREGORY, DECEASED; ZELDA F. GREGORY, INDIVIDUALLY; AND BRIAN GREGORY, A MINOR BY HIS NATURAL PARENT AND GUARDIAN ZELDA F. GREGORY

v.

GENERAL MOTORS CORPORATION, JOSEPH DOE, TOM DOE, HARRY DOE, ROBERT DOE, KEN DOE, DANIEL DOE, LARRY DOE, EDWARD DOE, SAM DOE, JACK DOE, FRED DOE, VINCE DOE,

General Motors Corporation,
Appellant in No. 86-5370

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY
(D.C. Civil Nos. 82-4031 & 85-381)

Argued February 24, 1987

Before: WEIS, BECKER, and HUNTER,
Circuit Judges

Filed September 22, 1987

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Attorney for Appellees
Bruce E. Danfield, et al.
and Zelda F. Gregory, et al.

OPINION OF THE COURT

WEIS, Circuit Judge.

The district court has certified to us the question whether decisions of the New Jersey Supreme Court violate the Equal Protection Clause in abolishing the state-of-the-art defense in asbestos personal injury cases. We determine that a common law precedent announced by a state's highest court is "law" within the meaning of the Equal Protection Clause. Using the rational basis standard, we conclude that the state court rulings survive the constitutional challenge.

The district court of New Jersey consolidated all of its pending asbestos cases for argument and disposition of the defendants' attack on the state supreme court's bar against "state-of-the-art" evidence in those personal injury cases. Sitting in banc, the district court rejected the defendants' contention that

they were denied equal protection and certified the question to us under 28 U.S.C. § 1292(b). We accepted the interlocutory appeal.

Asbestos litigation poses a serious problem for American tort law, which traditionally has provided for a "one-on-one" adjudication of claims.[1] The formidable number of asbestos suits has prompted efforts to adapt the procedural framework of the existing tort system with its inefficiencies, high costs, and inconsistent judgments to the pressing demands of this massive litigation. *See In re School Asbestos Litigation*, 789 F.2d 996, 1000-01 (3d Cir. 1986).

More than 30,000 asbestos personal injury claims were filed nationwide by 1986, and an additional 180,000 claims are projected to be on court dockets by the year 2010. *Id.* at 1000. Because no federal statute governs the substantive law applicable to these claims, they are controlled by the tort laws of the various states under theories of negligence, warranty, or strict liability. The courts in New Jersey, both state and federal, have been confronted by a particularly heavy concentration of these cases.

New Jersey common law recognizes the doctrine of strict liability in products liability claims. The supreme court of the state first adopted that theory in *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960), and later decisions expanded its scope. *See Restatement (Second) of Torts* § 402A. *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925

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1. A similar difficulty arose in the Agent Orange litigation, where the mass tort claims challenged the capacity of traditional rules to deal effectively with numerous suits involving multiple plaintiffs and defendants. There, too, the practical realities of case management coupled with the complexities of the claims imposed substantial hardships on existing tort procedures. See In Re: "Agent Orange" Product Liability Litigation, 506 F. Supp. 737, 782-87 (E.D.N.Y. 1979).

(1981); *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Santor v. A & M Karagheusian*, 44 N.J. 52, 207 A.2d 305 (1965).

In 1982, the Supreme Court of New Jersey issued a controversial decision in *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982). The plaintiffs there claimed damages based on the defendants' failure to warn of the dangers of asbestos. In response, the defendants asserted the "state-of-the-art" defense -- that at the relevant times they did not know, nor could have known, of the danger of their products.

The state supreme court ruled that "culpability is irrelevant" in product liability cases because "[s]trict liability focuses on the product, not the fault of the manufacturer." *Id.* at 546. Accordingly, a rule excluding the state-of-the-art defense would be consistent with the underlying policies of strict liability and would further its goals of risk spreading, accident avoidance, and simplification of the fact-finding process. The court reasoned that if the expenses arising from these claims were allocated to the costs of production, the manufacturers would be encouraged to improve product safety. Elimination of the defense would also ease the costly and time-consuming burden of proving "scientific knowability" and avert juror confusion about the differences between negligence and strict liability. *Id.* at 547-49. The *Beshada* opinion was not limited to asbestos cases, but applied to all products liability suits.

Two years later, the same court allowed drug manufacturers to assert the state-of-the-art defense, concluding that producers of pharmaceuticals have a duty to warn about dangers of which they know or should know based on reasonably obtainable or available knowledge. *Feldman v. Lederle*

Laboratories, 97 N.J. 429, 452, 479 A.2d 374, 386 (1984). Despite this shift in position, however, *Feldman* did not overrule *Beshada*; the court chose instead to explicitly restrict the earlier case to "the circumstances giving rise to its holding." *Id.*

One month later, a defendant asbestos manufacturer relied on *Feldman* and sought permission to introduce state-of-the-art evidence in a suit then pending in the state court. The trial court denied the motion on the ground that New Jersey law prohibited asbestos manufacturers from asserting the defense. *In the Matter of Asbestos Litigation Venued in Middlesex County*, No. L-52237-81 (N.J. Super. Ct., Law Div.), *aff'd*, 99 N.J. 201, 491 A.2d 700 (1984). The state supreme court summarily affirmed, stating: "[h]aving recognized that *Beshada* [citation omitted] applies to all pending asbestos cases, the . . . Order of the Superior Court . . . is summarily affirmed." *In the Matter of Asbestos Litigation Venued in Middlesex County*, 99 N.J. 201, 491 A.2d 700 (1984).

The present appeal arises out of this unsettled background. In various personal injury cases brought in the district court, defendant asbestos manufacturers attempted to introduce evidence on the state-of-the-art defense. They alleged that *Beshada*'s preclusion of that defense had the effect of treating them discriminatorily and less favorably than all other manufacturers. To avoid inconsistent rulings, the district court considered the matter in banc and entered an order applicable to all of its pending asbestos cases. *In re Asbestos Litigation*, 628 F. Supp. 774 (D.N.J. 1986).

A majority of the district judges decided that the defendants' request should be denied. In their view, legitimate concerns of case management, economics, as well as social welfare policy affecting exposed plaintiffs justified preclusion of the state-of-the-art

defense. *Id.* at 779. Noting that strict liability in workmen's compensation had withstood similar equal protection attacks, *id.* at 779 n.3, and finding a rational relationship between the *Beshada* ruling and its goals, the judges rejected the constitutional challenge.

A minority of the judges dissented on the grounds that the state supreme court had neither clearly articulated its rationale for eliminating the defense nor substantiated its expectations that the anticipated benefits would result.[2]

On appeal to this court, defendants contend that the New Jersey Supreme Court's decisions unconstitutionally discriminate among categories of civil litigants because no rational basis for the classification can be posited. Defendants also maintain that by failing to give adequate reason for its action, the state court violated the Due Process Clause of the Fourteenth Amendment.

Plaintiffs assert that the rational basis test is the appropriate standard for reviewing this equal protection challenge and that the wisdom of the state common law rule is not at issue.

First, we observe the somewhat unusual posture in which this case reaches us. The attack on the ruling, or more accurately the series of rulings, of the state supreme court did not come to the district court as a direct appeal.

A United States District Court may not entertain an appeal from judgments of the highest court of a state. Only the United States Supreme Court may exercise such review, and then only in cases within its jurisdiction. *See District of Columbia Court of Appeals*

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2. *See* In re Asbestos Litigation, 628 F. Supp. 774 (D.N.J. 1986) (en banc). Judge Bissell wrote the opinion for the majority of eight judges and Chief Judge Fisher wrote for the six dissenting judges.

v. Feldman, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust*, 263 U.S. 413, 416 (1923). The parties to the cases at hand constitute different groups than those in the challenged state court litigation, and hence neither res judicata nor law of the case principles apply. Defendants here have no avenue to attack the precedential effect of the New Jersey judgment governing their case except through objections to rulings in these cases filed in federal court.

The question presented to the district court, and now to us, is a variation on the theme of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), that is, whether the New Jersey decisions are binding even if their tenor is not in harmony with the federal constitution.

Erie requires that, in diversity cases, federal courts apply the substantive law produced by the state legislature or the highest court of the state. The *Erie* doctrine envisions a federal district court in diversity functioning as would a state trial court in similar circumstances.

There is, however, a fundamental difference between the two judicial systems that affects the application of the appropriate law. The state trial court is bound by its judicial hierarchical organization to follow the state supreme court's rulings on constitutionality despite possible doubt about the correctness of the decisions. In the absence of binding federal precedent, the state trial court should defer to the highest court of the state. The federal district court, however, takes as its authority on federal constitutional issues decisions of the United States Courts of Appeals and the United States Supreme Court, rather than those of the state supreme court.

The case before us differs from that where state court action usually is subjected to federal scrutiny -- the habeas corpus petition. In that setting, a district

court reviews the very same case adjudicated by a state appellate court. Here, however, the district court acts in the first instance on a case never before a state tribunal, yet governed by that state's precedent.

The threshold issue, thus, is whether *Erie* controls in circumstances where state law violates the federal constitution. Because the United States District Courts have the primary obligation to interpret and apply federal law, undoubtedly they can, and must, abjure *Erie* if its application would conflict with the United States Constitution.

This case presents several other curious features. Defendants do not contest being included within the scope of the *Beshada* doctrine along with other manufacturers. Rather, they complain that they were not excluded from it as were the other manufacturers in *Feldman*. Essentially, they do not argue that the strict liability holding of *Beshada* is constitutionally defective, whatever its other failings may be, but that asbestos manufacturers have been singled out for discriminatory treatment compared to other producers. Phrased differently, they protest the failure of the New Jersey Supreme Court to reverse *Beshada* in its entirety, rather than only partially.

In addition, unlike the usual equal protection case that challenges a legislative enactment, this attack is directed at the common law as announced by a state's highest court.

I.

History shows that state supreme court holdings were not always included within the meaning of "laws" to which equal protection applies. The oft-cited case of *Swift v. Tyson*, 41 U.S. 1 (1842), illustrates the original judicial interpretation. Section 34 of the Judiciary Act of 1789 provided that the "laws of the several states . . . shall be regarded as rules of

decision." Initially, the Supreme Court interpreted "laws" narrowly to include only statutory enactments and to exclude decisional law. In *Swift v. Tyson*, Justice Story commented, "[i]n the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws . . .. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws." 41 U.S. at 18.

In overruling *Swift v. Tyson*, *Erie* did not specifically address the meaning of "laws" in the equal protection context, but did expand the meaning to encompass, as rules of decision, both statutory law and decisional law. Justice Brandeis wrote that "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." 304 U.S. at 78.

Since that time, the Supreme Court has continued to use the word "laws" in its broader sense, reflecting to a degree the influence of Legal Realism and its conclusion that courts do, in fact, "make" law. In *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972), the Court saw "no reason not to give 'laws' its natural meaning" and concluded that "§ 1331 [federal question] jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."

In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), Justice Brennan spoke for four members of the Court who reached the issue and agreed that "laws" embraced federal common law. Referring to *Erie*, he explained that the Court had recognized there that the statutory word "laws" includes court decisions, and that rules of substantive

law are "as fully 'laws' of the United States as if they had been enacted by Congress." *Id.* at 393. *See also Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370 (1909) (Holmes, J., dissenting).

Whatever may have been the reaction of the courts in earlier times, we are persuaded that the district court properly considered the common law of New Jersey to be within the scope of the Equal Protection Clause.

II.

Because equal protection claims may be reviewed under a number of standards which differ in intensity, we find it necessary to select the proper test for use in this case. As a general rule, classifications that neither regulate suspect classes nor burden fundamental rights must be sustained if they are rationally related to a legitimate governmental interest. *See Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907 (3d Cir. 1987); *Price v. Cohen*, 715 F.2d 87, 92, 94 (3d Cir. 1983), *cert. denied*, 465 U.S. 1032 (1984); *Jamieson v. Robinson*, 641 F.2d 138, 142 (3d Cir. 1981).

The matter at issue here, the right of a manufacturer to invoke the state-of-the-art defense, is not fundamental under the Constitution nor is it a suspect classification. The Supreme Court has observed that "despite the fact that 'otherwise settled expectations' may be upset," a state may modify or abolish a cause of action at common law. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (1978), quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

In *Duke Power*, the Court upheld the constitutionality of the Price-Anderson Act, even though it carved out the private nuclear power industry for federal treatment in tort liability where

usually state common law would govern. That case approved a statutory ceiling on recoverable damages because the statute provided a "reasonably just" substitute for state law remedies. 438 U.S. at 93-94. In response to objections raised by potential plaintiff-victims, the Court cited *Munn v. Illinois*, 94 U.S. 113, 134 (1876), for the principle that "[a] person has no property, no vested interest, in any rule of the common law." The *Munn* Court had no doubt that "the law itself, as a rule of conduct, may be changed at the will or whim of the legislature unless prevented by constitutional limitations." *Id.*

In *Silver v. Silver*, 280 U.S. 117 (1929), the Court rejected an equal protection attack on a state statute denying recovery of damages by a gratuitous passenger against the driver of an automobile. The Court observed that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a possible legislative object." *Id.* at 122. *See also Corey v. Jones*, 650 F.2d 803 (5th Cir. 1981).

Other legislative alterations in the tort field have also withstood constitutional challenge. Of particular interest are the drastic changes in the traditional negligence standard for liability. The no-fault workmens' compensation program is one illustration of such treatment. *See Lower Vein Coal Co. v. Indus. Bd.*, 255 U.S. 144 (1921); *New York Central R.R. v. White*, 243 U.S. 188 (1917). Legislation that treats medical malpractice suits differently than other negligence claims provides another example. *See Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979); *Fein v. Permanente Med. Group*, 38 Cal.3d 137, 695 P.2d 665 (1985); *Florida Patient's Compensation Fund v. Von Stetina*, 474 So.2d 783 (Fla. 1985); *Johnson v. St. Vincent Hosp., Inc.*, 273

Ind. 374, 404 N.E.2d 585 (1980); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

In short, the nature of the right to assert a particular defense in a tort action is not among those characterized as "fundamental." It is not included in the field of human rights that touches on personal liberty, an area of special concern to the courts. Nothing inherent in the right to a tort defense lends itself to demand more scrupulous review than the other social and economic matters traditionally examined under the rational relationship test. *See G. D. Searle & Co. v. Cohen*, 455 U.S. 404 (1982); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Ortwein v. Schwab*, 410 U.S. 656 (1973).

It is by now well established that in confronting a problem in the area of economic and social welfare, a state does not violate the Equal Protection Clause merely because the classifications drawn by its laws are imperfect. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). *See also New Orleans v. Dukes*, 427 U.S. 297 (1976).

Having determined that the nature of the right asserted here does not place it in a category requiring heightened scrutiny, we must now consider whether the judicial rather than legislative origin of the alleged infringement mandates a more searching review. As noted earlier, classifications subject to the Equal Protection Clause generally originate in the legislature. In the case before us, the dissenting district judges

observed that where judicial action creates the classification, the "efficacy of the checks and balances inherent in 'the democratic process' is substantially reduced." 628 F. Supp. at 780 (Fisher, C.J., dissenting). For that reason, they concluded that a more critical equal protection test should be applied here.

The presumption of validity attaching to state legislation is based to some extent on the proposition that improvident decisions will be rectified eventually by the democratic process. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). However, we are not persuaded that this consideration carries any particular weight in the present circumstances.

The common law ruling by the New Jersey Supreme Court is susceptible to prompt and uncomplicated reversal by the state legislature if it deems fit. That procedure is not in the least more complex than if the precedent promulgated by the state supreme court had been enacted as a statute by the legislature. It is important to remember that speedy statutory revision remains available to correct any imprudent state court common law precedent. In fact, a bill intended to overrule *Beshada* was introduced in the New Jersey legislature. This bill never emerged from the Committee on Judiciary to which it was referred, consequently aborting the legislative effort to restore the state-of-the-art defense in products liability litigation to pre-*Beshada* status. S. 1465, 201st N.J. Leg., 1st Sess. (1984).

The democratic process is as readily accessible to overrule a common law precedent created by the state's highest court as it is to repeal a statutory enactment. We recognize that in a democracy the legislature may be the more appropriate branch to draw classifications based on public policy. As a popularly elected body, the legislature is in a position to tap the thinking of its

constituency and has the resources to secure data generally not available to the courts.

Nevertheless, particularly in the tort field, the common law tradition remains strong. States exercise considerable latitude to accomplish fundamental shifts in policy by judicial action as well as by legislation. For example, the abolition of contributory negligence as a complete defense and the substitution of comparative negligence has been effected in some states by the courts, *see, e.g., Hoffman v. Jones*, 280 So.2d 431 (Fla. Sup. 1973), while in other jurisdictions by the legislature. *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 7102 (Purdon 1982); N.J. Stat. Ann. § 2A:15-5.1 (West Supp. 1986).

We are not convinced that either the nature of the subject matter or the procedure utilized in arriving at the challenged ruling constitutes sufficient grounds for requiring a stricter standard of review for common law decisions subjected to equal protection attacks.

One other element present here -- case management -- tips the scale in favor of the state court ruling. The *Beshada* court gave prime consideration to this concern, a subject in which the expertise of a court substantially outweighs that of a legislature and deserves due deference.

Taking the significant elements entering into the state court's ruling and balancing them against the valid competency concerns of court and legislature, we discern no measurable imbalance that weakens the presumption of regularity attaching to the state's choice of alternatives.Considering the social, economic, and administrative nature of the issues before the state court, we cannot say that its action in deciding the state-of-the-art defense question warrants strict scrutiny. We therefore conclude that the rational basis test is applicable to the classification drawn by the *Beshada* and *Feldman* courts.

III.

We now turn to a closer examination of the challenged state decisions.

Beshada was an appeal of six consolidated asbestos personal injury cases. As noted earlier, the New Jersey Supreme Court's opinion did not limit its discussion or holding to asbestos manufacturers, but spoke of strict liability in general. The court reasoned that the phrase "duty to warn" was misleading because it implied negligence concepts irrelevant to the concerns of strict liability.

According to the court, the correct focus was whether the product was defective for lack of a warning. If so, the proper aim of the litigation was to compensate the victims. Ultimately, the court concluded that even if a manufacturer had no knowledge of a condition that required a warning, as between the innocent victims of a defective product and the distributors of that product, the latter should bear any unforeseen costs.

Academic criticism of *Beshada* has been harsh. *See generally The Passage of Time: The Implications for Product Liability*, 58 N.Y.U. L. Rev. 733 (1983). One commentator termed the decision "unjustifiable on grounds of logic and public policy." Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. Rev. 892, 902 (1983). Another said, "[b]y and large I regard the decision as indefensible . . . . If our only goal is compensation, we should not handle products liability cases through the tort system." Epstein, *Commentary*, 58 N.Y.U. L. Rev. 930, 933 (1983).

Deans Page and Wade, whose works were favorably cited in *Beshada*, also criticized the decision. Dean Wade remarked that "[t]he Pennsylvania and New Jersey courts appear to be straining too hard in their efforts to develop a different standard of product

actionability for strict liability actions . . ..[B]ecause of the way in which insurance premiums are set . . . these tests may render a disservice to both product suppliers and consumers throughout the country." Wade, *On Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734, 744 (1983). Dean Page described the policy reasons articulated in *Beshada* as "weak justification[s] for a narrower rule of strict liability." Page, *Generic Product Risks: The Case Against Comment K and for Strict Tort Liability*, 58 N.Y.U. L. Rev. 853, 879 (1983).

The failure to warn issue next came before the New Jersey court in the 1984 *Feldman* case. There, the court reversed its former position and said, "[g]enerally, the state-of-the-art . . . and available knowledge are relevant factors" and "generally conduct should be measured by knowledge at the time the manufacturer distributed the product." 479 A.2d at 386.

Feldman acknowledged *Beshada* only by saying, "we do not overrule *Beshada*," but proceeded to "restrict [it] to the circumstances giving rise to its holding." *Id.* at 388. The opinion further noted "in passing, that, although not argued and determined in *Beshada*, there were or may have been data and other information generally available, aside from scientific knowledge, that arguably could have alerted the manufacturer at an early stage in the distribution of its product to the dangers associated with its use." *Id.*

At another point, the *Feldman* court concluded that *Beshada* would not demand a contrary conclusion in "the typical design defect or warning case." *Id.* at 387. The court also refused to agree that *Beshada* held "generally or in all cases . . . that in a warning context knowledge of the unknowable is irrelevant in determining the applicability of strict liability." *Id.*

These imprecise statements and the unequivocal ruling in *Middlesex Asbestos Litigation* that *Beshada* applies to pending asbestos cases leads us to the following assessment: (1) in New Jersey, *Beshada* does apply to asbestos cases but not to all products liability cases; and (2) *Feldman* does not govern asbestos cases, but does not necessarily apply to all other products liability cases.

New Jersey, therefore, does treat asbestos cases differently than other products liability cases. However, we do not know if this disparate treatment applies exclusively to asbestos cases. In addition to the expressed justifications of risk-spreading, accident avoidance, and simplification of the fact-finding process, *Feldman* provides yet another underlying reason for precluding the state-of-the-art defense in the asbestos setting. The opinion suggests that these manufacturers knew the dangers of asbestos and, consequently, the state-of-theart defense could not be sustained.[3]

This theory is expressed more clearly in *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986), an opinion handed down after the state supreme court refused to apply *Feldman* to asbestos cases. *Fischer* determined that one manufacturer did know the hazards of asbestos by the 1930s and that other manufacturers could have gained similar knowledge through articles published at that time in scientific journals. *Feldman* had earlier held that "a reasonably prudent manufacturer will be deemed to know of reliable information generally available or reasonably obtainable in the industry." 479 A.2d at 387.

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3. *See* Asbestos Litigation Reporter, 13,800-01 (Jan. 2, 1987) for documentary evidence of the knowledge of asbestos diseases available in 1930.

Although it may be said that *Fischer* embodies post-hoc justification for *Beshada*, the latter had cited *Hardy v. Johns-Manville Sales Corp.*, 509 F.Supp. 1353 (E.D. Tex. 1981), one of a series of cases within the Fifth Circuit reflecting varying judicial responses to the state-of-the-art defense in asbestos litigation even before *Beshada* appeared on the scene. *See e.g. Hardy v. Johns-Manville Sales Corp.* ("Hardy II") 681 F.2d 334 (5th Cir. 1982); *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1982); *Borel v. Fibreboard Paper Products Corp.493 F.2d 1076 (5th Cir. 1973); Hardy v. Johns-Manville Sales Corp.* ("Hardy I"), 509 F. Supp. 1353 (E.D. Tex. 1981); *Flatt v. Johns-Manville Sales Corp.*, 488 F. Supp. 836 (E.D. Tex. 1980); *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242 (E.D. Tex. 1980).[4]

Some federal courts believed that because asbestos plaintiffs so frequently litigated the state-of-the-art issue, they were entitled to use offensive collateral estoppel to preclude further repetition. *Hardy I*, 509 F. Supp. at 1361; *Flatt v. Johns-Manville Sales Corp.*, 488 F. Supp. at 841. The Court of Appeals, however, determined that to use collateral estoppel in this context would be to "elevate judicial expedience over considerations of justice and fair play." *Hardy II*, 681 F.2d at 348.

In *Hardy I*, the district court applied collateral estoppel based on an omnibus order derived from the earlier Court of Appeals decision in *Borel* to preclude relitigation of the state-of-the-art defense. The trial court construed *Borel* to establish that, as a matter of law, the plaintiffs need not prove the defendants knew or should have known of the dangerous propensities of their products.

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4. The Court of Appeals for the Fourth Circuit has also discussed the subject. *See also* Spartanburg County School Dist. Seven v. National Gypsum Co., 805 F.2d 1148 (4th Cir. 1986); Reed v. Tiffin Motor Homes, Inc., 697 F.2d 1192 (4th Cir. 1982).

The Court of Appeals, however, concluded that the district court had tried to reach a result that the binding substantive law of the forum state had not yet reached. Consequently, because necessary procedural prerequisites were absent and because doubts existed as to the accuracy of the underlying findings, the Court of Appeals refused to give preclusive effect to the issue of the state-of-the-art defense.[5]

We do not overlook the fact that exposure to asbestos may vary in degree depending on whether an individual works in a plant that manufactures asbestos products or simply drives an automobile equipped with asbestos brake linings. Nevertheless, *Beshada*'s broad language, when applied to the concrete facts of asbestos litigation and read together with *Fischer*, is not completely divorced from reality, despite its abstract appearance of assessing culpability for failure to know and warn of the unknowable.

In the case at hand, the dissenting district judges have mounted powerful arguments to sustain the equal protection challenge. Ultimately these arguments are grounded in the wisdom and correctness of *Beshada* and its progeny, an appraisal not within the function of the federal courts when called upon to assess equal protection attacks on state law. This restraint is especially appropriate when the reviewing court employs the rational basis standard, a test that does not permit federal courts to strike down classifications because they are unwise or inartfully drawn. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Delaware River Basin Comm'n v.*

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5. For a detailed analysis of the difficulties of applying collateral estoppel to asbestos litigation, see Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 Iowa L. Rev. 141 (1984).

Bucks County Water & Sewer Auth., 641 F.2d 1087 (3d Cir. 1981).

Moreover, we must not overlook the importance of allocating the burden of proof. In equal protection cases, those who challenge state law must convince the court that the factual assumptions on which the classification is apparently based could not reasonably be conceived as true by the governmental decision maker. *See Vance v. Bradley*, 440 U.S. at 110. *See also Malmed v. Thornburgh*, 621 F.2d 565, 571 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980). We cannot say that the asbestos manufacturers have met that burden.

Nor may we ignore the federalism concerns that color this controversy. These considerations are invoked by long-standing acceptance of the notion that tort law, much like the law of domestic relations, belongs almost exclusively to the states. Although that principle alone would not require a federal court to stay its hand when a violation of equal protection occurs, we must recognize that the states possess a high degree of competence as well as a traditional claim of independence in this field.

From that perspective, too, it is unrealistic to ignore the fact that the doctrine of strict products liability advocated by the *Restatement (Second) of Torts* § 402A and adopted by New Jersey is in itself a classification that imposes discriminatory liability on a particular group of defendants. At the turn of the century, the common law held manufacturers and defendant-distributors of defective products liable in most instances only if proved negligent. State court decisions, however, developed tort law to wipe out the reasonable conduct defense and to establish liability without fault not only for manufacturers of defective products, but also for the utterly fault-free retailer.

Nevertheless, no equal protection challenge has successfully undermined that doctrine.[6]

In refining and narrowing the § 402A theory, *Beshada* eliminates one more defense to the liability of asbestos defendants. Because the court's reasoning may be applicable to other defendants in similar circumstances, the justification advanced both directly and indirectly by the New Jersey court may be regarded as weak and ill-advised. We cannot, however, conclude that the state court's position is irrational. The concepts of risk-spreading and compensation for victims by manufacturers of unreasonably dangerous products are cornerstones of § 402A, and they may be consistently applied to asbestos as well as to other products.

Although not in itself a determinative factor in the elimination of a substantive defense, the desirability of simplifying the fact-finding process and thus making it easier for victims to recover has been recognized by the law. Workmens' compensation programs and no-fault auto insurance plans share that common goal. Under workmens' compensation laws, both the employer and the employee yield common law rights in exchange for a plan of prompt, fixed payments controlled by an administrative agency. Nevertheless, the Supreme Court made it clear in *Duke Power* that the lack of a *quid pro quo* is not a prerequisite to approval of modification of traditional common law tort doctrine. 438 U.S. at 88.

Administrative convenience standing alone is not an adequate ground for the elimination of a

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6. *See* Gogol v. Johns-Manville Sales Corp., 595 F. Supp. 971, 974-75 (D.N.J. 1984), another asbestos case, where the court addressed a similar equal protection question. Recognizing that tort law makes numerous distinctions between classes of litigants, the court found no constitutional violation.

substantive defense. *Medora v. Colautti*, 602 F.2d 1149, 1153 n.9 (3d Cir. 1979). However, we cannot help but be conscious of the extraordinary size of the asbestos personal injury litigation. As we commented in *In Re School District Asbestos Litigation*, this unprecedented phenomenon in American tort law requires states be given some leeway in devising their own solutions.

In reaching its decision, the *Beshada* court considered the possibility that a jury might become confused by the testimony of experts who would "speculate as to what knowledge was feasible in a given year." Consequently, the court opined that it should "resist legal rules that will so greatly add to the costs both sides incur in trying a case." 477 A.2d at 548.

It might be questioned whether the defendants themselves worried about the potential cost of producing evidence necessary to reduce or eliminate their liability and whether they, in fact, welcomed the court's concern about their litigation expenses. Moreover, *Beshada*'s interest in simplifying the trial of asbestos cases was substantially undercut by *Fischer*, where the state supreme court permitted personal injury plaintiffs to receive punitive damages on proof that the defendants had failed to comply with the state-of-the-art.[7] Notwithstanding the distinction between what was known and what was knowable, for all practical purposes what *Beshada* precluded from coming in the front door, *Fischer* allows in the back

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7. We note that this opinion invoked one of the grounds we reluctantly predicted would be used by state courts to permit punitive damages in asbestos personal injury cases. In Re School Asbestos Litigation, 789 F.2d at 1004. The New Jersey court rationalized its decision in part by noting that because other states allowed the recovery of exemplary damages, New Jersey citizens should have similar rights.

door. Thus, the goal of simplifying asbestos litigation is eroded by the New Jersey decision to award punitive damages in these cases.

Although we find the *Fischer* case troubling, as did the dissenting district judges in the case at hand, we once again acknowledge our limited function in reviewing cases of this type. We cannot overlook the fact that those plaintiffs who wish to avoid the cost of proving the foundation for an uncertain award of punitive damages still may take advantage of the simplified compensation claim *Beshada* makes available. While the use of that alternative may be conspicuous by its rarity, we have no empirical data that suggests it will never be employed.

IV.

We further conclude that the due process challenge raised on appeal is not sustainable. Appellants have not been deprived of their due process right to be heard; they have only been denied one available defense. Because other defenses remain in their arsenal, they have not lost their ability to defend against the claims brought by asbestos victims. Nor can the contention that the New Jersey court's reasoning is unarticulated and irrational stand in light of the steady evolution over the last twenty years of the doctrine of strict products liability in that state's law. As our discussion of equal protection indicated, there are legitimate state interests here that have a reasonable basis, enabling the New Jersey law to survive scrutiny under the Due Process clause.

V.

In summary, we conclude that common law decisions of state supreme courts are subject to equal protection scrutiny under the same rational basis standard applicable to legislative enactments.

Decisions of the state supreme court that fall within the economic and social fields are to be evaluated under the rational relationship test. We further decide that the policies of risk-spreading, compensation for victims, and simplification of trials in the highly unusual circumstances of asbestos claims furnish an adequate, albeit minimal, basis for eliminating the state-of-the-art defense in these cases and preclude a successful equal protection challenge to the New Jersey Supreme Court decision abolishing that defense.

The district court has presented to us the question whether, in strict liability failure to warn cases in New Jersey, the judicially imposed denial of the state-of-the-art defense to manufacturers of asbestos-containing products constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment.

We answer in the negative.

BECKER, *Circuit Judge*, concurring.

I join in Parts I, II and IV of Judge Weis's opinion and concur wholly in the result. I also join in portions of Part III, in which Judge Weis explains why he finds a rational basis for New Jersey's distinguishing asbestos cases from prescription drug cases in terms of the state-of-the-art defense.[1] However, I do not believe that Judge Weis has identified with sufficient precision the New Jersey Supreme Court's reasons for making the distinction under review, a distinction I believe to be supported by a valid government objective and rational within our equal protection jurisprudence.

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1. For the reasons I have not joined in the balance of Part III, see *infra*, typescript at 16-18.

Specifically, I believe that, on the basis of adjudicative facts determined in cases that had the full panoply of procedural protections, the New Jersey Supreme Court has determined a legislative fact -- that the hazards of asbestos exposure were knowable to the industry at all relevant times. The subject of legislative factfinding is rarely discussed in the jurisprudence, and I write separately to explain why I think it validates the New Jersey Supreme Court's distinction.

Appellants complain that the New Jersey Supreme Court deprives manufacturers and distributors of asbestos-containing products of the state-of-the-art defense in products liability/failure to warn actions, which other manufacturers and distributors are entitled to assert in the same kind of lawsuits. Appellants urge that no rational theoretical basis exists for differentiating between these classes of litigants. Judge Weis in his opinion demonstrates that is not clear that all other manufacturers may take advantage of the state-of-the-art defense, although he agrees that New Jersey "does treat asbestos cases differently than other product liability cases." Weis Op., typescript at 19. I believe that we need not find constitutional infirmity even if we assume for the sake of argument appellants' worst case scenario, i.e., that New Jersey singles out the asbestos industry.

I.

As I read the New Jersey Supreme Court's cases, the court does not deny asbestos defendants the state-of-the-art defense on theoretical grounds. Instead, I believe that the New Jersey court, via the *Beshada-Feldman-Fischer* trilogy, has determined a legislative fact -- that, at all relevant times, asbestosis harms were knowable to the industry. That being the case, the New Jersey Supreme Court has reasonably

decided to preclude endless relitigation of what was "knowable" to the asbestos industry.[2]

Believing that "*Feldman* provides yet another underlying reason for precluding the state-of-the-art defense in the asbestos setting," Judge Weis observes that "the [*Feldman*] opinion suggests that these manufacturers knew the dangers of asbestos and, consequently, the state-of-the-art defense could not be sustained." Typescript at 20 (footnote omitted). Although I agree with Judge Weis that the New Jersey Supreme Court has determined that the harms of asbestos were actually known to at least one asbestos manufacturer, I do not believe that it found in *Feldman* that the harms of asbestos were actually known to the industry. Rather, on the basis of what could have been known, that opinion determines constructive knowledge sufficient to defeat the state-of-the-art defense. It was not until *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986), that the court found that at least one asbestos manufacturer actually knew of the harms.

The *Beshada* court did have before it the factual dispute concerning what was known. It found,

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2 The state-of-the-art defense, as the name implies, does not merely rest on an inquiry concerning what a manufacturer knew. Rather, the defense is intended to limit liability to those dangers of which the seller "has knowledge, or by application of reasonable, developed human skill and foresight should have knowledge." Restatement (Second) of Torts, § 402A comment j. Implicit in the defense, therefore, is the obligation to investigate and keep abreast of recent developments -- an obligation imposed under the aegis of "constructive knowledge[, which] may encompass virtually all information that is in the public domain." Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 Iowa L. Rev. 141, 190 n. 276. The relevant determination is thus not what was known, but what was knowable. *See also infra* at 8-9.

however, that it need not resolve the "substantial factual dispute about what defendants knew and when they knew it," 447 A.2d at 542, referring both to a finding that "[k]nowledge of the danger [of asbestos] can be attributed to the industry as early as the mid-1930's . . . ." *Id.* at 542, (quoting *Hardy v. Johns-Manville Sales Corp.*, 509 F.Supp. 1352, 1355 (E.D. Texas 1981)) and the contrary assertions of the asbestos industry.[3] Pertinent in *Feldman* is the exact manner that the court restricted the application of *Beshada* when it differentiated between asbestos products and other products in the context of the state-of-the-art defense:

> We do not overrule *Beshada*, but restrict *Beshada* to the circumstances giving rise to its holding. *See, e.g., Friedman v. Podell*, 21 N.J. 100, 105 (1956); *Konrad v. Anheuser-Busch, Inc.*, 48 N.J. Super. 386, 388 (Law Div. 1958) ("Cases state principles but decide facts, and it is only the decision on the facts that is binding precedent."). We note in passing, that, although not argued and determined in *Beshada*, there were or may have been data and other information generally available, aside from scientific knowledge, that arguably could have alerted the manufacturer at an early stage in the distribution of its product to the dangers associated with its use.

97 N.J. at 455. Thus, while the New Jersey Supreme Court in *Beshada* expressly did not decide "what defendants knew and when they knew it," 447 A.2d at 542, it also refrained from deciding that question in *Feldman*. In *Feldman*, it stated only that the

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3. *Hardy*, in turn, rests to a significant degree on *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974).

manufacturers "arguably *could* have [been] alerted . . . at an early stage in the distribution of its product to the dangers associated with its use," 97 N.J. at 455 (emphasis supplied). Rather than finding actual knowledge, the *Feldman* opinion thus intimated its views on constructive knowledge, which is sufficient to defeat the state-of-the-art defense, based on facts brought to its attention in *Beshada*.

In *Fischer* the New Jersey Supreme Court determined not only that asbestosis harms were knowable by the asbestos industry, but that those harms were actually known by at least one manufacturer. In that case, the court recited two single-spaced pages of facts that determined to its satisfaction that at least one company "did in fact have knowledge of the hazards of asbestos . . . as early as the 1930's." 103 N.J. 649 (quoting 193 N.J. Super. at 117). For example, the court referred to "eleven scientific articles published between 1936 and 1941 documenting the grave pulmonary hazards of exposure to asbestos and discussing the measures which could be taken to protect workers." *Id.* at 650 (quoting 193 N.J. Super. at 118). On the more individualized level of worker exposure, a doctor testified that "from the beginning of his employment [in 1944] he saw persons with asbestosis 'on a regular and frequent basis' and frequently made recommendations that such employees receive job reclassifications which would remove them from continued exposure to asbestos dust." *Id.* at 651 (quoting 193 N.J. Super. at 120). As early as 1933, noted the court, asbestos workers were filing claims against at least one asbestos manufacturer. *See id.* at 650 (quoting 193 N.J. Super. at 118).

The state-of-the-art defense decides not what the defendant or another party knew -- a fact relating to a particular party -- but what was knowable -- a fact

about the state of the world. In *Feldman*, the court adverted to what was knowable, but in *Fischer* it made a concrete determination. By deciding that even one company in the industry -- Johns-Manville -- knew of asbestosis, the Supreme Court of New Jersey, culminating the trilogy, found that the harms were knowable to the industry as a whole.

To my mind, it was not inappropriate for the court to rely on this determination -- or even a similar earlier determination, *see, e.g., Hardy, cited in Beshada*, 447 A.2d at 542 -- in finding legislative facts[4] when it determined that the rule of *Beshada* should continue to govern the asbestos industry. As Justice Holmes recognized long ago, "the court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law." *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548-49, 44 S.Ct. 405, 406 (1924). To forbid such recognition would force courts to fashion laws without reference to reality.

Judge Hunter, in dissent, acknowledges that one manufacturer was found to have known of asbestos' harms in *Fischer*, but he finds that case unhelpful for judging the rationality of the challenged differentiation between asbestos and non-asbestos defendants because it was decided after the differentiation was first drawn. *See* Dissent, typescript at 16, n.4. I disagree. I believe that the New Jersey Supreme Court rested the differentiation on the views it intimated in *Feldman*, i.e., the legislative fact that asbestos' harms were knowable. This avenue was open to New Jersey's highest court despite the putative protestations of a federal court, *see Hardy*, or the lack of "a certain degree of consensus," *id.* As Professor Davis has opined,

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4. For a definition of legislative facts and demonstration that knowability is a legislative fact, see *infra* at Part I. B.

> judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly • • • within the domain of the indisputable.' Facts most needed in thinking about problems of law and policy have a way of being outside the domain of the clearly indisputable.

K. Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in Perspectives of Law 69, 82 (1964), *quoted in* Fed. R. Evid. 201, advisory committee's note.

Leaving aside the argument that the court's pronouncement in *Feldman* amounted to such a legislative fact-finding, and assuming that that fact was not found until *Fischer*, I still do not believe that we should today pronounce it irrational. Labelling the differentiation irrational would be contrary New Jersey's current position regarding manufacturers' ability to have known. Moreover, it would involve this court in a meaningless ritual of striking down a differentiation that we know to be supportable, only for the state court to revive it as supported on the basis we have already identified. For similar reasons, Justice Stevens has warned about unduly emphasizing actual motivation for the differentiation under review in equal protection challenges of legislative enactments.

> Actual purpose is sometimes unknown. Moreover, undue emphasis on actual motivation may result in identically worded statutes being held valid in one State and invalid in a neighboring State. I therefore believe that we must discover a correlation between the classification and either the actual purpose of the statute or a legitimate

> purpose that we may reasonably presume to have motivated an impartial legislature.

United States R.R. Retirement Bd. v. Fritz, 449 U.S. 453, 180-81, 101 S.Ct. 453, 462, 66 L.Ed.2d 368 (1980) (Stevens, J., concurring in the judgment). Because the legislative fact-findings of *Fischer* may reasonably be presumed to have motivated a hypothetical impartial court, we would have to affirm even had *Feldman* not preceded that case.

The determination of knowability implicates the standard to which the state is willing to hold a manufacturer of a product: not only must a manufacturer stay abreast of what has already been discovered about his product, but he must also diligently pursue information about its possible dangers before he introduces it for distribution throughout the marketplace. *See supra* typescript at 2-3 n.2. As such, under the aegis of "constructive knowledge," the New Jersey Supreme Court has made a policy judgment concerning the diligence with which the manufacturers should have undertaken additional investigation. *See Feldman*, 479 A.2d at 386-87. Thus, regardless of whether a given manufacturer is found to have actually known of the harms, the New Jersey Supreme Court could find that the industry was chargeable with the knowledge that was attainable had the manufacturers undertaken the task of discovery. As Judge Weis indicates, the court in *Feldman* made clear that "a reasonably prudent manufacturer *will be deemed* to know of reliable information generally available or reasonably obtainable in the industry." 479 A.2d at 387 (emphasis supplied); *see* Weis Op., typescript at 21. Such a determination cannot be made without reference to facts concerning the availability of information to the asbestos industry as a whole. However, once this factual assessment had been made,

the court was also justified in precluding the relitigation of the factual basis of the state-of-the-art defense.[5]

II.

Judge Hunter in dissent argues that, because the use of legislative facts concerning the knowability of asbestos harms does not satisfy the requirements of the collateral estoppel doctrine, it violates due process. I disagree. The above discussion demonstrates that, in choosing to allow the state-of-the-art defense for other industries, the New Jersey Supreme Court did not have to turn a blind eye to its belief that the harms of asbestos were knowable to the asbestos indutry as a whole. Common law courts could not fashion rules grounded in reality if they were obliged to proceed without aid of legislative facts. As is evident from other cases that have found legislative facts, legislative fact-finding by such a court need not conform to the requirements of collateral estoppel to pass due process muster. I therefore do not believe that the New Jersey Supreme Court can be held to have acted unconstitutionally in finding the legislative facts it did when fashioning the law at issue in this case.

In the New Jersey Supreme Court cases discussed above, the factual determination concerning the knowability of asbestos harms is a legislative fact. "Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Fed. R. Evid. 201(a)

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5. *See, e.g.*, Forte Towers, Inc. v. City of Miami Beach, 360 So.2d 81, 82 (Fla. App. 1978) (precluding relitigation of factual predicate).

advisory committee's note. Under this dichotomy, the pertinent facts, which concern the nature of the asbestos industry as a whole and what it could have known, were properly treated by the court as legislative. As one commentator has noted,

> An industry-wide question calls for facts about the industry; facts about each company may be unhelpful and may even get in the way. If a court . . . is making law to govern an industry of 100 companies, the *useful* facts are about the 100 companies as a group, not about each company. The facts about the group are legislative, even though they are the sum of adjudicative facts about each company.

3 K. Davis, *Administrative Law Treatise* § 15:5, at 152-53 (2d ed. 1980) (emphasis in original). The issue of the knowability of asbestos harms concerns not what a particular litigant knew, but rather what knowledge was in the realm of the possible for the industry as a whole. Because the knowability of the harms of asbestos may thus be a legislative fact upon which a court can fashion a rule of law, it was not inappropriate for the New Jersey Supreme Court to base a legal rule upon these legislative facts. *See generally* Fed. R. Evid. 201(a) advisory committee's note; Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 270-71 (1944).[6]

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6. Judge Hunter believes that the state-of-the-art determination concerning the knowability of asbestos' harms is an adjudicative fact. Arguing by analogy, he finds the issue similar to whether asbestosis and mesothelioma were caused by asbestos exposure in a particular case, held to be a matter of adjudicative fact in *Laster v. Celotex*, 587 F.Supp. 542 (S.D. Ohio 1984). The analogy fails, however, because the development of these diseases relates to the peculiar conditions under which a person is exposed -- for example, whether the person smokes and the ambient air concentration of asbestos dust. *See Laster*, 587 F.Supp. at 543. In

Many courts and commentators have argued that a court should not rely on legislative facts without giving the parties an opportunity for comment upon them.

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the context of what was knowable by the asbestos industry, however, the peculiarities of a specific manufacturer are irrelevant. *See supra* at 2-3 n.2, 8-9. What *may* have been known is the heart of the state-of-the-art inquiry; in the causation inquiry, by contrast, "judicial notice that the inhalation of asbestos *may* cause asbestosis under certain conditions would have no appreciable impact." *Laster*, 587 F.Supp. at 544 (emphasis in original).

In any event, if the knowability of asbestos' harms were purely an adjudicative fact, it could not be the subject of a legislative fact-finding. The contrary is true, however, for the Senate Committee on Labor and Public Welfare made a specific legislative finding concerning the knowability of asbestos' harms when deciding to enact the Occupational Safety and Health Act.

> Asbestos is another material which continues to destroy the lives of workers. For 40 years it has been known that exposure to asbestos caused the severe lung scarring called asbestosis.

S. Rep. No. 1282, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. and Admin. News, 91st Cong., 2d Sess. 5177, 5178.

Judge Hunter also argues that "culpable knowledge," like disease causation, is an ultimate fact that cannot be resolved on the basis of legislative facts. First, I am perplexed by the phrase "culpable knowledge," for the state-of-the-art inquiry does not look at what was known by the individual defendant, but what could have been known in the industry by the application of reasonable diligence. *See supra* at 2-3 n.2, 8-9. Second, I fail to understand why legislative fact-finding cannot resolve an ultimate issue; indeed, in the Supreme Court cases Judge Hunter cites as finding legislative facts, those facts seem to relate only to ultimate issues. *See* Dissent at 12; Church of Latter-Day Saints v. Amos, ___ U.S. ___, 107 S.Ct. 2862, 2875 (1987) (O'Connor, J., concurring) (perception of endorsement of religion in Establishment Clause case); United States v. Leon, 468 U.S. 897, 918-21 (1984) (deterrent effect of exclusionary rule); *compare Hawkins*, 358 U.S. at 77-78 (allowing adverse spousal privilege because adverse testimony found to hurt marriage) *with* Trammel v. United States, 445 U.S. 40, 52 (overruling *Hawkins* because "[w]hen one spouse is willing

See, e.g., Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1328-29 (E.D.N.Y. 1981); 3 K. Davis, *Administrative Law Treatise* § 15:9; S. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 60 (4th ed. 1986) ("We do not claim Judges cannot rely on a broad range of facts to force the law forward. We suggest only that the parties should be permitted to participate in the march."). It is therefore noteworthy that the *Beshada* case was itself concerned with developing facts pertinent to the knowability of asbestos harms. Additionally, the *Hardy* and *Borel* cases, on which *Beshada* and *Feldman* appear to be predicated, as well as the *Fischer* case, were litigated with the full panoply of procedural protections. Moreover, the court in *Beshada* did not hear from only one member of the industry; rather, a broad cross-section of the industry was represented. *See* 447 A.2d at 541-42. Finally, the members of the asbestos industry had the opportunity to advocate a contrary conclusion in *In re Asbestos Litigation Venued in Middlesex County*, 99 N.J. 201, 491 A.2d 700 (1984), and again in *Fischer*. Hence, the affected industry has had relevant opportunities to respond to the New Jersey Supreme Court's determination of the pertinent legislative facts.

It is unclear whether Judge Hunter would find relevant to his due process point the legislative nature of the facts relied on by the New Jersey Supreme Court. Because a legislative fact is not an individualized fact, however, the Constitution does not mandate that it be found through a process of individualized

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to testify against the other in a criminal proceeding . . . their relationship is almost certainly in disrepair"). Finally, I disagree with the characterization of the state-of-the-art defense as the ultimate issue in a products liability case. It is no more or less ultimate a determinant of liability than, to take Judge Hunter's other example, causation.

fact-finding.[7] Because legislative facts are the basis for a rule of law, they need not be relitigated in each succeeding case that invokes the rule and thereby indirectly relies on the legislative fact. It does not offend due process to craft the rule without allowing individualized process for redetermination of the legislative facts on which the rule is based. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 278, 84 S.Ct. 710, 725 (1964) (finding state libel law unconstitutional because of "the pall of fear and timidity imposed upon those who would give voice to public criticism"); *Hawkins v. United States*, 358 U.S. 74, 78, 79 S.Ct. 136 (1958) ("Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage.").

Judge Hunter would apparently require a state Supreme Court to adhere to the strictures of collateral estoppel doctrine whenever it rests a rule of law upon a legislative fact that had been previously determined as an adjudicative fact in a prior court case. Such a rule would deprive courts of the ability to fashion rules with reference to the reason borne of experience. "The history of the common law shows a constant pattern of questions once treated as fact growing into matters of law after the courts have gained knowledge and experience concerning them." Korn, *Law, Fact, and Science in the Courts*, 66 Colum. L. Rev. 1080, 1105 (1966). Thus, for example, the decision to admit into evidence novel scientific testimony is first tested by

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7. Thus the Supreme Court long ago found a critical difference between *Londoner v. Denver*, 210 U.S. 373 (1908), in which a small number of people were exceptionally affected upon individual grounds by a tax increase and therefore should have been afforded individual due process, and *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), in which the court found that a general tax increase could be predicated without individualized fact-finding.

individual adjudications before judicial recognition eliminates the need for a preliminary foundation. *See United States v. Downing*, 753 F.2d 1224, 1234 (3d Cir. 1985).[8] Courts have even elevated the fact finding of a single jury verdict to the position of legislative fact on which to base a rule of law.[9] In all instances of adjudicative facts' elevation to legislative facts, the prior adjudications, with their full panoply of procedural protections, influence the court's view of reality. The legislative facts, in turn, influence the rule that is fashioned, and the due process clause does not require individualized determination or reconsideration of the legislative facts in all subsequent cases.

Finally, Judge Hunter goes beyond testing the New Jersey Supreme Court's determination against the due process clause of the fourteenth amendment. He also finds that, "[i]f judicial notice can be taken of such ultimate facts at all, it can only be within the strictures of Fed. R. Evid. 201." Dissent, typescript at 17; *see also id.* typescript, at 18 (finding "does not satisfy the requirements of Fed. R. Evid. 201"). While I find the advisory committee's comments illuminating on the distinction between adjudicative and legislative facts, I do not believe that Rule 201 binds any state court. More important, Judge Hunter's point seems

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8. Specifically, although originally a subject to be re-established by expert testimony in every case, courts long ago came to give blood-grouping tests conclusive effect in paternity suits. *See, e.g.*, Jordan v. Mace, 144 Me. 351, 69 A.2d 670 (1949); *see generally* Ross, *The Value of Blood Tests as Evidence in Paternity Cases*, 71 Harv. L. Rev. 466 (1958).

9. *See, e.g.*, Commonwealth v. Sullivan, 146 Mass. 142 (1888) (finding on the basis of a prior jury decision that, as a matter of law, a certain game was a regulated "lottery"), *cited in* Korn, *Law, Fact, and Science in the Courts*, 66 Colum. L. Rev. 1080, 1104 (1966).

inapposite to the central issue. The question is not whether New Jersey wisely found legislative facts -- I do not endorse the New Jersey Supreme Court's finding, for I do not pass on the wisdom of what it has done. Rather, for our purposes it is sufficient that New Jersey behaved rationally.[10] Because legislative facts underlie the New Jersey Supreme Court's decision to continue to withhold the state-of-the-art defense from asbestos manufacturers, the differentiation under review cannot be deemed irrational.

III.

I have not joined the balance of Part III of Judge Weis' opinion because I do not find a rational basis for New Jersey's distinction in any of the other justifications he advances. I briefly note my diffferences with the remainder of Judge Weis' Part III.

For the most part, the other rationales advanced by Judge Weis do not explain the New Jersey Supreme Court's distinction; rather, they imply that, because of the New Jersey Supreme Court's conceded hegemony over the development of that state's tort law, we must defer to whatever distinction the court draws. For example, he appears to regard the differentiation in and of itself as a matter of state policy in a matter of

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10. As one commentator has noted in the context of legislative fact-finding by a legislative body:

> Given the bent to test due process according to the information available to the legislature, the truth-content of the data is not directly relevant. The question is whether sufficient data exists which could influence a reasonable legislature to act, not whether ultimately this data is true.

E. Cleary, *McCormick on Evidence* § 331, at 768 (2d ed. 1972) (footnote ommitted); *see also* Burns Baking Co. v. Bryan, 264 U.S. 504, 517, 44 S.Ct. 412, 415, 68 L.Ed. 813 (1924) (Brandeis, J., dissenting).

state expertise, which is said to deserve our deference. *See, e.g.*, Weis Op., typescript at 23, n.6 (characterizing dissent as "a spirited attack on the wisdom of the New Jersey Supreme Court's decisions in the asbestos cases"); *id.*, typescript at 25 ("Because the court's reasoning may be applicable to other defendants in similar circumstances, the justification advanced both directly and indirectly by the New Jersey court may be regarded as weak and ill-advised. We cannot, however, conclude that the state court's position is irrational."). Additionally, Judge Weis draws attention to "the federalism concerns that color this controversy" -- concerns, I must note, that are ever present in Fourteenth Amendment challenges. *Id.*, typescipt at 24.

To determine the issue on the basis of such deference, however, assumes the answer to the equal protection inquiry. If we were to defer to the extent suggested by Judge Weis in all equal protection cases, no differentiation could be found irrational. Moreover, this extra dose of deference is duplicative. As Judge Weis so artfully demonstrates in Part II of his opinion, deference to legislative and state decisionmakers is part of the rationale behind the rational relation standard itself. To add greater deference would totally eviscerate that standard. This is clearly not the intended result of rational relation scrutiny. *See, e.g.*, *Cleburne v. Cleburne Living Center*, ___ U.S. ___, 105 S.Ct. 3249 (1985) (finding city ordinance unconstitutional under rational relation equal protection scrutiny). Rather, the rational relation standard requires at least one justification for the challenged differentiation. It may be that the justification is to be judged by the lax standard enunciated in *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (reviewing court must be convinced "that the legislative facts on which the classification is

apparently based could not reasonably be conceived to be true by the governmental decisionmakers"), but one such justification must nonetheless exist.

Additionally, although Judge Weis does not rely on administrative convenience *simpliciter*, he justifies the differentiation at least partially on that basis. I agree with Judge Weis to the extent that he holds that administrative convenience may play a role in prompting differentiation when an independent reason also supports it. As I have explained *supra*, I find that the New Jersey Supreme Court has reached the conclusion that that the state-of-the-art defense should not be available to the asbestos manufacturers because the harms of asbestos were knowable to the industry. Administrative convenience is thus a justification for the differentiation because state courts are not proscribed by the Equal Protection Clause from refusing to hear a defense that, as a matter of law, is doomed to fail. However, beyond such considerations, administrative convenience fails as a justification.

IV.

While states must be allowed to make their own policy judgments in matters such as tort law, they cannot use that discretion to arbitrarily discriminate against a class of litigants. Where a factual basis supports a differentiation, however, both the policy decision and the underlying factual determination deserves our deference.[11] In an equal protection case,

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11. Because the determination of legislative facts is thus a component of fashioning a rule of law, the clearly erroneous standard of Rule 52(a) does not apply to review of a federal court's findings concerning legislative facts. *See* Lockhart v. McCree, 106 S. Ct. 1758, 1762 n.3 (1986); *see generally* Dunagin v. City of Oxford, Miss., 718 F.2d 738, 748-49 n.8 (5th Cir. 1983) (en banc) (plurality opinion of Reavley, J.).

those challenging the state law "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979), *quoted in Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 724 (1981) (citing other cases). Because the court has found that at least one asbestos manufacturer had actual knowledge of the harms of asbestos at all relevant times, I do not believe that its determination of knowability "could not reasonably be conceived to be true by the governmental decisionmaker." I therefore concur in this aspect of Part III of Judge Weis's opinion.[12]

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12. Another reason exists for deferring to a state supreme court's determination of legislative facts. Because a state court must make a decision concerning legislative facts despite imperfect information, its decision deserves deference. As Justice Blackmun's concurrence in *United States v. Leon*, 468 U.S. 897, 927, 104 S.Ct. 3405, 3423, 82 L.Ed.2d 677 (1984) (Blackmun, J., concurring), noted concerning the issues in that case,

> I see no way to avoid making an empirical judgment of this sort and I am satisfied that the Court has made the correct one on the information before it. Like all courts, we face institutional limitations on our ability to gather information about "legislative facts" . . . . Nonetheless, we cannot escape the responsibility to decide the question before us, however imperfect our information may be, and I am prepared to join the Court on the information now at hand.

HUNTER, *Circuit Judge, DISSENTING:*

PRELIMINARY STATEMENT

1. In these diversity cases, we look to the law of New Jersey. New Jersey has embraced the full panoply of products liability law. *See, e.g., Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 406 A.2d 140 (1979); *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960). The "state-of-the-art" defense is normally available to defendants in products liability actions. This defense precludes liability where the manufacturer can prove that it did its work properly and produced the product in accordance with the practices and procedures appropriate to the product's known dangers. Today this court has ruled that the manufacturers of one product may not use the state-of-the-art defense. That product is asbestos. The court has said to asbestos manufacturers: there are too many asbestos cases, these cases have clogged up the court calendars, schedules and statistics; the proof of "state-of-the-art" is too time-consuming and concerned with too many variables; and, in any event, we do not think you could prove the defense even if we gave you the chance. Thus, one narrow class of defendants is deprived of a potentially exculpatory defense in the interest of expediency and calendar control. The manufacturers of all other products -- including Agent Orange, the Dalkon Shield and DES -- may use the defense, even if they are also clogging up the court calendar and causing statistical chaos. Only the asbestos industry is treated differently. This is just plain wrong and I dissent.

I.

2. It is beyond dispute that a classification that neither discriminates against a suspect class nor impinges upon a fundamental right does not violate

the Equal Protection Clause if it is rationally related to a legitimate governmental purpose. *See United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). While it is beyond our authority to strike down laws simply because we conclude that they are unwise or inartfully drawn, *id.*, neither are we required to give our stamp of approval to classifications that are arbitrary or wholly insubstantial. *See Delaware River Basin Commission v. Bucks County Water & Sewer Authority*, 641 F.2d 1087, 1097 (3d Cir. 1981) ("the rationality standard is not 'toothless'"). Whether or not the lawmakers' "governmental purpose" under review must be clearly articulated by the lawmakers in order to be deemed legitimate cannot be definitively answered by reference to Supreme Court precedent. *Compare Fritz*, 449 U.S. at 170 with *Fritz*, 449 at 166 (Brennan, J., dissenting) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975)). However, our own precedents teach us that "[s]o long as we are careful not to attribute to the legislature purposes which it cannot reasonably be understood to have entertained, we find that in examining the challenged provisions we may consider purposes advanced by counsel . . . or suggested initially by ourselves." *Delaware River Basin*, 641 F.2d at 1092. Our job then, is to determine whether the common law doctrine challenged in this case is in furtherance of a legitimate state purpose put forward by the New Jersey Supreme Court, the appellees, the United States District Court for the District of New Jersey, or ourselves, and whether the common law rule fits closely enough with any of those purposes that it can be said to be rationally related to them. I conclude that New Jersey's common law rule creates a classification that is not rationally related to a legitimate governmental purpose, and therefore deprives asbestos manufacturers of the equal protection of the laws in

violation of the Constitution of the United States. Before engaging in this constitutional analysis, I will review the line of cases in question.

II.

3. In *Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981), the New Jersey Supreme Court explained the difference between a failure to warn claim based on strict liability and a failure to warn claim based on negligence. Under either rubric, plaintiff will recover damages from the defendant if, given the dangerousness of the product, the manufacturer's failure to provide warnings was unreasonable. The failure to provide warnings will be found unreasonable if warnings would have made the product safer. Negligence and strict liability actions differ in the manner in which the manufacturer's knowledge of the product's dangerousness is determined. Where a negligence plaintiff must prove that the defendant knew or should have known of the dangerousness of the product, the defendant's knowledge of the product's dangers is presumed as a matter of law in the strict liability action. Thus, "negligence is conduct-oriented, asking whether defendant's actions were reasonable; strict liability is product-oriented, asking whether the product was reasonably safe for its foreseeable purposes." *Beshada v. Johns-Manville Corp.*, 90 N.J. 191, 200, 447 A.2d 539, 544 (1982) (citing *Freund*, 87 N.J. at 238, 432 A.2d at 929).

4. In *Beshada v. Johns-Manville Corp.*, the New Jersey Supreme Court decided that the state-of-the-art defense is inapplicable to a strict liability failure-to-warn claim. Through the state-of-the-art defense, defendants are able to introduce evidence of the technology available at the time the product was manufactured and distributed in order to prove that

the state of scientific knowledge was such that they could not have known of the product's dangers when it was put into the stream of commerce. *Id.* at 202, 447 A.2d at 545. The state-of-the-art defense is thus logically incompatible with *Freund*, which imputes knowledge to defendants as a matter of law. Moreover, because state-of-the-art is essentially a negligence defense, in that it seeks to explain why defendants are not culpable, it seems inappropriate in a strict liability case, in which culpability is irrelevant. *Beshada*, 90 N.J. at 204, 447 A.2d at 546. The court admitted that "the phrase 'duty to warn' is misleading, [because i]t implies negligence concepts with their attendant focus on the reasonableness of defendant's behavior." *Id.* Nevertheless, the court committed itself to strict liability in failure-to-warn cases, and firmly rejected the state-of-the-art defense.

5. In response to a torrent of criticism, the New Jersey Supreme Court departed from its stand against the state-of-the-art defense in *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984). In *Feldman*, the court concluded that strict liability for failure to warn was inherently illogical. "A warning that a product may have an unknowable danger warns one of nothing." *Id.* at 454, 479 A.2d at 387. The court did not eliminate the strict liability failure to warn cause of action, but chose instead to transform it. Where, in *Freund* and *Beshada*, strict liability actions were characterized by the imputation to defendant of knowledge of the product's dangerousness, in *Feldman*, they became characterized by the applicable burden of proof. "In strict liability warning cases . . . the defendant should properly bear the burden of proving that the information was not reasonably available or obtainable and that it therefore lacked actual or constructive knowledge of the defect." *Id.* at 455-56, 479 A.2d at 388. The court refused to overrule

Beshada, but did "restrict *Beshada* to the circumstances giving rise to its holding." *Id.*[1] It is in the context of this murky state of New Jersey "law" that we must address our problem.

III.

6. By "restrict[ing] *Beshada* to the circumstances giving rise to its holding," the New Jersey Supreme Court created the classification challenged here. My review of the *Beshada-Feldman* line of cases leads me to conclude that the challenged classification represents nothing more than an unprincipled, expedient, and ineffective response to widespread criticism of the *Beshada* doctrine combined with an unwillingness to give up the application of *Beshada* to asbestos manufacturers. If so, the *Beshada-Feldman* classification is undeniably arbitrary. Worse yet, I fear that the New Jersey Supreme Court's sole purpose may have been to inflict a special punishment on asbestos manufacturers. The Constitution does not permit the New Jersey courts to level either an arbitrary or a punitive sanction against asbestos manufacturers (or the manufacturer of any other product, for that matter). Proper analysis of this classification under the rational basis test should disclose to us whether the classification is impermissibly arbitrary or punitive. I will address each of the justifications for the common law rule advanced by Judge Weis and Judge Becker: the asbestos

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1. The meaning of this sentence is by no means clear on its face. Subsequent case law was has shown that "restricting *Beshada* to the circumstances giving rise to its holding" means that asbestos defendants are not permitted to use the state-of-the-art defense. *See In re Asbestos Litigation Venued in Middlesex County*, 99 N.J. 201, 491 A.2d 700 (1984). The restriction has not yet been applied to any other manufacturer, and there is no indication that it will be.

manufacturers' knowledge of the dangers of asbestos; case-management; and jury confusion.[2]

A.

7. Judge Weis and Judge Becker agree that the principal "legitimate state purpose" underlying the *Beshada-Feldman* doctrine is "the New Jersey Supreme Court['s reasonable decision] to preclude [the] endless relitigation of what was 'knowable' to the asbestos industry." Becker at 2. According to Judge Weis, "[t]he [*Feldman*] opinion suggests that [asbestos] manufacturers knew the dangers of asbestos and, consequently, the state-of-the-art defense [cannot] be sustained" by those manufacturers. Weis at 20-21. Specifically, the New Jersey Supreme Court concluded in *Feldman* that "there were or may have been data or other information generally available, aside from scientific knowledge, that arguably could have alerted the manufacturer at an early stage . . . to the dangers [of asbestos]." 97 N.J. at 456, 479 A.2d at 388. Thus, since the majority of this panel and the New Jersey Supreme Court claim to know for a certainty that all asbestos manufacturers either acted with full knowledge of the dangers of their product or could and should have obtained such knowledge, those manufacturers should not be permitted to litigate the knowledge question any further. I have trouble accepting this aim as a "legitimate state purpose" under the Equal Protection Clause, because I believe it

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2. In *Beshada*, the court articulated its reason for precluding the use of the state-of-the-art defense in all strict liability failure-to-warn cases. The court justified its ruling on the basis of traditional strict liability policy concerns: deep pockets, risk spreading and accident avoidance incentives. The articulation of purposes underlying the *Beshada* rule does not, however, provide any basis for the *Feldman* distinction, which limits the *Beshada* rule to one class of defendants alone.

violates the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, Sec. 1 cl. 3.

8. This so-called legitimate state purpose can best be described as a de facto exercise of collateral estoppel without benefit of the procedural niceties. On the basis of the New Jersey Supreme Court's declaratory dicta in *Feldman* that asbestos manufacturers did indeed possess culpable knowledge at all relevant times, those manufacturers must be collaterally estopped from litigating the question of their knowledge ever again. Judge Weis feels that this "legitimate state purpose" is a creature somehow related to collateral estoppel, as his discussion of a series of fifth circuit opinions dealing with the procedural complexity of collateral estoppel in massive asbestos litigation demonstrates. His review of the line of cases culminating in the fifth circuit's opinion in *Hardy v. Johns-Manville Sales Corp.* ("*Hardy II*"), 681 F.2d 334 (5th Cir. 1982), leads him to conclude that "*Beshada*'s broad language, when applied to the concrete facts of asbestos litigation and read together with *Fischer* [*v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986)], is not completely divorced from reality." Weis at 23. I am not sure what this statement means, but it is clear that Judge Weis has concluded that, since plaintiffs have experienced difficulties in prevailing on their collateral estoppel motions heretofore, *see, e.g., Hardy II*, the courts may constitutionally grant all plaintiffs the benefit of collateral estoppel through application of their own wisdom rather than the traditional channels of legal process. I believe that *Hardy II* teaches a much different lesson than this. I read *Hardy II* as reiterating the wellworn legal principle that defendants will be collaterally estopped from relitigating factual issues where

> The party asserting the estoppel [can] show that: (1) the issue to be concluded is identical to that involved in the prior action; (2) in the prior action the issue was "actually litigated"; and (3) the determination made of the issue in the prior action [was] necessary and essential to the resulting judgment.

681 F.2d at 341. The grant of a collateral estoppel motion where these conditions are not met violates a party's right to due process. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313, 329 (1971). A fortiori, Judge Weis' sua sponte grant of collateral estoppel to all future asbestos plaintiffs violates the Due Process Clause and thus cannot provide a legitimate state purpose under the rationality test. Indeed, "to use collateral estoppel in this context would be to 'elevate judicial expedience over considerations of justice and fair play.'" Weis at 22 (quoting *Hardy II*, 681 F.2d at 348).

9. Judge Weis points out that, after its decision in *Feldman*, the New Jersey Supreme Court found that at least one asbestos manufacturer -- Johns-Manville -- did indeed have actual knowledge of the dangers of asbestos as early as the 1930's. *See Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986). I cannot understand how the subsequent adjudication of an unrelated party's culpable knowledge can render the *Feldman* court's attribution of knowability to all asbestos manufacturers by judicial fiat constitutional. This conclusion very simply does not satisfy the requirements of the collateral estoppel doctrine. It is a fundamental tenet of our procedural law that the court's factual findings in the *Fischer* case can only be used against Johns-Manville. "The requirement that a person against whom the conclusive effect of a judgment is invoked must be a

party or a privy to the prior judgment . . . has been repeatedly affirmed[.]" *Hardy II*, 681 F.2d at 338 (citations omitted). *Accord Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.") (citations omitted). Thus, with or without the *Fischer* court's adjudication of Johns-Manville's actual knowledge, the principle justification for the challenged classification asserted by Judge Weis is very simply not a legitimate state purpose for the New Jersey Supreme Court's discriminatory treatment of asbestos manufacturers.

B.

10. Judge Becker attempts to circumvent the collateral estoppel problem by characterizing the New Jersey Supreme Court's conclusion in *Feldman* "that the hazards of asbestos exposure were knowable to the industry at all relevant times," Becker at 1, as a "legislative fact" of which the court may freely take judicial notice. I believe that Judge Becker's argument fails because it relies on a misapprehension of the nature of the legislative facts that may be judicially noticed under the common law of evidence. There are two kinds of fact of which courts may take judicial notice: "adjudicative" and "legislative."[3] "Adjudicative facts are simply the facts of the particular case." Fed. R. Evid. 201 advisory committee's note. "'Adjudicative facts,' . . . are the ultimate facts in the case, plus those evidential facts that are sufficiently central to the controversy that they should be left to the jury unless clearly indisputable." 21 C. Wright & K. Graham,

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3. The adjudicative fact/legislative fact dichotomy was first articulated by Professor Kenneth Culp Davis in 1942. *See* Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 404-07 (1942).

Federal Practice and Procedure § 5103, at 478 (1977). "Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Fed. R. Evid. 201 advisory committee's note.

11. My understanding of what constitutes a "legislative fact" seems to be at odds with Judge Becker's. In my view, legislative facts are those social, economic and philosophical facts upon which we rely to fashion just, appropriate and suitable rules of law. We derive these legislative facts from a common-sense assessment of how modern-day Americans live and view their world. Legislative facts are broad conceptions or beliefs about the interaction of law and society that inform judicial policy-making. As such, these legislative facts may be truisms, or may be wholly incapable of proof or disproof. The United States Supreme Court regularly takes judicial notice of legislative facts to resolve cases involving major policy determinations in the areas of constitutional law and criminal procedure. *See, e.g., Church of Latter-Day Saints v. Amos*, ___ U.S. ___, 107 S. Ct. 2862, 2875 (1987) (O'Connor, J., concurring) ("The determination of whether the objective observer will perceive an endorsement of religion 'is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.'") (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring)); *United States v. Leon*, 468 U.S. 897, 918-21 (1984) (discussing the probable deterrent effect of the exclusionary rule on police officers); *Detroit*

Edison Co. v. NLRB, 440 U.S. 301, 318 (1979) ("The sensitivity of any human being to disclosure of information that may be taken to bear on his or her competence is sufficiently well known to be an appropriate subject of judicial notice.") (footnote omitted); *Hawkins v. United States*, 358 U.S. 74, 77-78 (1958) ("The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. . . . Adverse testimony given in criminal proceedings would, we think, be likely to destroy any marriage."); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) ("To separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

12. I realize, of course, that not all judicially noticed legislative facts involve the kinds of fundamental and glamorous policy questions central to the cases cited in the previous paragraph. Indeed, the observations made through the medium of judicial notice are just as likely to be obvious and mundane. *See, e.g., Kessler Inst. for Rehabilitation v. NLRB*, 669 F.2d 138, 141 (3d Cir. 1982) (court takes judicial notice of "the delays in the postal system which have been increasing over the years"); *Neeld v. National Hockey League*, 594 F.2d 1297, 1300 (9th Cir. 1979) (court takes judicial notice of dangers posed by one-eyed hockey players to uphold rule barring such players from professional hockey teams). Furthermore, courts may take judicial notice of legislative facts for reasons totally unrelated to the development of policy. For example, courts regularly take judicial notice of

legislative facts in order to determine whether or not particular activities come within specified statutory prohibitions. *See, e.g., United States v. Gould*, 536 F.2d 216, 220-21 (8th Cir. 1976) (court takes judicial notice of fact that cocaine hydrochloride is derivative of the cocoa leaf in order to determine whether or not it is a Schedule II controlled substance). However, I have never heard of any case in which the resolution of an ultimate fact -- *e.g.*, the innocence or culpability of a products liability defendant -- was reached through the judicial notice of legislative facts.

13. The asbestos manufacturers' actual or constructive knowledge of the potential harms of asbestos does not bear any resemblance to the legislative facts judicially noticed in the cases cited above or in any other case I have found. The knowledge question does not rest upon a generalized assumption or conclusion about the state of things in order to come to a rational policy decision, rather, it demands the resolution of a hard, cold, specific factual dispute that is central to the products liability litigation between the injured plaintiffs and defendant asbestos manufacturers before the court in each case. The question posed involves a determination of who knew what, when they knew it, and when they should have known it. To my way of thinking, this has every indicia of an adjudicative fact.

> When a court . . . finds facts concerning the immediate parties -- who did what, where, when, how, and with what motive or intent -- the court . . . is performing an adjudicative function, and the facts are conveniently called adjudicative facts. . . .
>
> Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go

> to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.

2 K. Davis, *Administrative Law Treatise* § 15.03, at 353 (1958) (quoted in *Gould*, 536 F.2d at 219).

14. Nor am I persuaded by Judge Becker's assertion in footnote 6 of the concurring opinion that "if the knowability of asbestos' harms were purely an adjudicative fact, it could not be the subject of a legislative fact-finding." Not every fact found by a legislat*ure* is necessarily legislat*ive*. Legislatures can and often do find facts that would undeniably be classified as "adjudicative" if they had been found in a judicial proceeding. For instance, in 1979 the House Select Committee on Assassinations found that

> A. Lee Harvey Oswald fired three shots at President John F. Kennedy. The second and third shots he fired struck the President. The third shot he fired killed the President.
>
> 1. President Kennedy was struck by two rifle shots fired from behind him.
>
> 2. The shots that struck President Kennedy from behind him were fired from the sixth floor window of the southeast corner of the Texas School Book Depository building.
>
> 3. Lee Harvey Oswald owned the rifle that was used to fire the shots from the sixth floor window of the southeast corner of the Texas School Book Depository building.
>
> 4. Lee Harvey Oswald, shortly before the assassination, had access to and was present on the sixth floor of the Texas School Book Depository building.
>
> 5. Lee Harvey Oswald's other actions tend to support the conclusion that he assassinated President Kennedy. . . .

H.R. Rep. No. 1828, 95th Cong., 2d Sess. 1 (1979). Since these facts were found by a legislature, Judge Becker would characterize them as legislative facts. Thus, if Judge Becker's definition of "legislative fact" is correct, then we would have to reach the extraordinary conclusion that a court trying Lee Harvey Oswald for the murder of President Kennedy could take judicial notice of the "legislative fact" that Lee Harvey Oswald killed President Kennedy, and thereby the court could avoid the inconvenience of requiring the government to prove the ultimate fact in the case. It is beyond peradventure that such a use of judicial notice of "legislative facts" would constitute not only a denial of due process but also a violation of the bill of attainder clause. U.S. Const. art. I, § 10, cl. 1. Notwithstanding any legislative pronouncement on the matter and notwithstanding the firmness of the trial judge's belief of Oswald's guilt, the court could not deprive Oswald of his day in court simply because "he doesn't have a chance of winning, anyway." However, this is precisely the way that the *Beshada-Feldman* rule treats asbestos defendants. I believe that Judge Becker's attempt to characterize the knowability of asbestos harms as a "legislative fact" is misguided and does not justify our countenancing this pernicious rule.

15. My conclusion that the knowledge question requires the determination of an adjudicative rather than a legislative fact is buoyed by analogous decisions reached in two other asbestos cases. *See Hardy II*, 681 F.2d at 347-48; *Laster v. Celotex Corp.*, 587 F. Supp. 542 (S.D. Ohio 1984). In *Hardy* and *Laster*, the courts were asked to take judicial notice of a fact closely related to the one before us -- whether or not exposure to asbestos causes cancer, pleural mesothelioma or asbestosis. Without hesitation, both courts classified the fact to be noticed as an adjudicative fact. *See Laster*, 587 F. Supp. at 543 ("Clearly, the facts

pertaining to whether asbestosis and mesothelioma are caused by exposure to asbestos are 'adjudicative facts' under Rule 201."). The causation issue clearly requires the resolution of an adjudicative (rather than a legislative) fact for the same reasons that the knowledge or knowability issue does. First, like the question of knowledge, the question of asbestos' role in the development of certain diseases "relate[s] to the [immediate] parties, their activities, [and] their businesses," and thus must be classified as an adjudicative fact. More importantly, disease causation and culpable knowledge are both ultimate facts in products liability litigation,[4] and cannot be properly resolved by judicial notice of legislative facts.[5] *See*

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4. In footnote 6 of the concurring opinion, Judge Becker urges that the knowability *vel non* of the harms of a particular product is not an ultimate fact in a strict liability - failure to warn case. I respectfully disagree. "'Ultimate' facts are those which the law makes the occasion for imposing its sanctions." *The Evergreen v. Nunan*, 141 F.2d 927, 928 (2d Cir. 1944) (Hand, J.) "Ultimate facts" describe those specific historical or narrative facts which are decisive to the outcome of a particular case because their proof is absolutely necessary to establish the elements of a claim or defense. *See Winters v. Lavine*, 574 F.2d 46, 57-58 n.12 (2d Cir. 1978). Clearly, the unknowability of harms associated with a particular product is the ultimate narrative or historic fact that a producer of that product must prove in order to establish the state-of-the-art defense.

5. Judge Becker argues that adjudicative facts may be "elevated to legislative facts" and relied upon to shape judicial decisions in later litigation. *See* Becker at 12-13. I express no opinion on this statement as a general matter. However, I find the proposition faulty as applied to the instant case for two reasons. First, prior to its development of the *Beshada-Feldman* classification, the New Jersey Supreme Court had never found as an adjudicative fact that any asbestos manufacturer had knowledge of the potential harms of asbestos. Admittedly, such a finding was made in *Fischer*, but that case was decided two years after *Feldman*, and could not have provided a basis for the

Korematsu v. United States, 584 F. Supp. 1406, 1415 (N.D. Cal. 1984). If judicial notice can be taken of such ultimate facts at all, it can only be within the strictures of Fed. R. Evid. 201.[6]

Beshada-Feldman classification. To the extent that the New Jersey Supreme Court may have relied on the *Borel-Hardy* line of cases, such reliance is undercut by the fifth circuit's rejection in *Hardy II* of a lower court's effort to rely on facts adjudicated in previous cases by means of collateral estoppel or judicial notice. Furthermore, I do not think adjudicative facts can possibly be elevated to the level of legislative facts unless a certain degree of consensus has been reached in the earlier litigation. Otherwise, judges may be tempted to reach into an uncertain and confusing mass of conflicting decisions and -- shunning the restraints imposed by the laws of evidence and collateral estoppel -- pull out the result most to their liking. Such procedures run afoul of the proper presentation of proof in our adversary system. I hasten to remind Judge Becker that "[t]he doctrines of 'legislative facts' and 'judicial notice' are not talismans by which gaps in a litigant's evidentiary presentation may be repaired on appeal." *City of New Brunswick v. Borough of Milltown*, 686 F.2d 120, 131 n.15 (3d Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983).

For similar reasons, I think that the statement by Professor Davis quoted by Judge Becker on page 9 of the concurrence does not support his judicial notice thesis. First of all, I do not believe that Professor Davis was thinking about the propriety of applying a fact adjudicated in one or a handful of products liability cases against an entire industry. I think his concern was with the ability of judicial and administrative tribunals to fashion regulatory rules on the basis of generalized observations about a specific industry. Second, I cannot believe that Professor Davis would approve of the development of an industry-wide "legislative fact" on the basis of a fact adjudicated about only one company in the industry. I am certain that he would require some broader consensus about industry-wide knowledge before elevating an adjudicative fact about Johns-Manville to a legislative fact about all asbestos manufacturers.

6. Judge Becker takes issue with my conclusion that Fed. R. Evid. 201 applies to the cases *sub judice*. Becker at 15.

16. A court may only take judicial notice of an adjudicative fact where that fact is "generally known within the territorial jurisdiction of the trial court[; and] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. Even assuming that some potential hazards of asbestos were known in the 1930's, it is by no means "generally known" or indisputable that the various specific uses of asbestos (*e.g.*, the use of asbestos to insulate automobile brake linings) were all known to be hazardous to workers or consumers as far back as the 1930's. The fifth circuit and the Southern District of Ohio were not even willing to take judicial notice of the fact that asbestos necessarily causes the various diseases with which it

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Assuming (as Judge Becker does) that the *Beshada-Feldman* rule involves the taking of judicial notice of the knowability of asbestos harms, and assuming (as I have demonstrated) that the knowability of asbestos harms is an adjudicative fact, then it seems clear that Fed. R. Evid. 201 applies to the cases *sub judice*. I note that it is at least arguable that Fed. R. Evid. 201 defines the minimum process due a litigant, under the Vth and XIVth amendments, before a court can take judicial notice of an adjudicative fact; *see Eidt v. City of Natchez*, 421 So. 2d 1225 (Miss. 1982); however, it is not necessary here to resolve whether Fed. R. Evid. 201 describes minimal constitutional protections. All of the cases *sub judice* are in federal district court, and, therefore, the Federal Rules of Evidence are applicable. *Gallup v. Caldwell*, 120 F.2d 90, 94 (3d Cir. 1941) ("This rule as to judicial notice is not affected by *Erie R.R. v. Thompkins*."); *Laster*, 587 F. Supp at 542; 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4512 at 190 (1982) ("Of all the procedural and quasi-procedural rules that are applied in federal courts, the Federal Rules of Evidence are the least affected by the Erie doctrine."). Thus, whether or not "Rule 201 binds any state court," Becker at 15, it binds the federal court in which these cases await adjudication. If (as Judge Becker contends) the doctrine of judicial notice lies at the bottom of this controversy, then Rule 201 supplies the rule of decision.

has been associated. According to the fifth circuit in *Hardy II*, "[t]he proposition that asbestos causes cancer, because it is inextricably linked to a host of disputed issues -- . . . [including whether or not] this manufacturer [was] reasonably unaware of the asbestos hazards in 1964 -- is not at present so self-evident a proposition as to be subject to judicial notice." *Hardy II*, 681 F.2d at 347-48. Similarly, the issue of knowledge or knowability is "not at present so self-evident a proposition to be subject to judicial notice." Therefore, the issue of knowledge or know-ability cannot properly be judicially noticed as an adjudicative fact under Fed. R. Evid. 201.

17. Fed. R. Evid. 201 also provides that "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." The parties in this case were not given such an opportunity. Judge Becker argues that "the affected industry [*i.e.*, asbestos manufacturers] had relevant opportunities to respond to the New Jersey Supreme Court's determination of the pertinent legislative facts." Becker at 10-11. The significant opportunities cited by Judge Becker include the industry's participation in two fifth circuit cases, *Hardy* and *Borel*, and in two cases decided by the New Jersey Supreme Court after the *Beshada-Feldman* classification had been developed, *Fischer* and *In re Asbestos Litigation Venued in Middlesex County*, 99 N.J. 201, 491 A.2d 700 (1984). Judge Becker's conclusion is unprecedented. I have never heard of any case that has permitted a party's "opportunity to be heard" to be satisfied in subsequent litigation before the same court, or -- even more incredibly -- in prior litigation before an unrelated tribunal. Furthermore, even if Judge Becker's remarkable conclusion were to be accepted, it does not satisfy the requirements of Fed. R. Evid. 201, which

requires the court to provide "an opportunity to be heard *as to the propriety of taking judicial notice*," Fed. R. Evid. 201 (emphasis added), not simply an opportunity to be heard on the merits. I find the New Jersey Supreme Court's failure to give the asbestos manufacturers an opportunity to be heard as to the propriety of taking judicial notice understandable, in light of the fact that they probably did not realize they were taking judicial notice (of either a legislative or an adjudicative fact) until so informed by Judge Becker.

18. In sum, Judge Becker has grasped the notion of legislative facts -- a notion that this court has viewed with the greatest of skepticism, *City of New Brunswick*, 686 F.2d at 131 -in an attempt to fix the broken shell of the *Beshada* decision and to patch-over New Jersey's violation of the Equal Protection and Due Process clauses. "All the King's horses . . . "

C.

19. Judge Weis observes that although "[a]dministrative convenience standing alone is not an adequate ground for the elimination of a substantive defense . . . [the court] cannot help but be conscious of the extraordinary size of the asbestos personal injury litigation." Weis at 26. While Judge Weis has rejected explicit reliance on the case management rationale as an independent justification for the *Beshada-Feldman* classification, he continues to believe that it buttresses the other justifications he has put forward. Because I find none of the other arguments advanced by Judge Weis or Judge Becker persuasive, I will examine the administrative convenience argument separately to determine whether it provides any support for the challenged classification. I find that it does not. The simple fact that elimination of a defense for one group saves time is not enough to justify discriminating between that group and another that is

similarly situated. The case management rationale simply cannot provide a legitimate basis for depriving this one class of manufacturers of an exculpatory defense, particularly in light of the massive expenditure of court time and judicial energy required by DES, Dalkon Shield, Agent Orange and miscellaneous pharmaceutical and environmental disaster litigation. I do not mean to imply that the Fourteenth Amendment bars any effort to address a perceived crisis in a particular kind of litigation; legislatures all over the country have demonstrated that such crises can be dealt with constitutionally by developing means that are rationally related to the aim of averting them.

20. Judge Weis looks to the nationwide enactment of no-fault automobile insurance statutes to provide support by analogy for the *Beshada-Feldman* classification. Due to the extreme diversity of these statutes, I have limited myself to an examination of the laws of New Jersey and Pennsylvania to determine whether Judge Weis' reliance is justified. The New Jersey Automotive Reparation Act, N.J. Stat. Ann. 39:6A-8 (West 1973 & Supp. 1986), "bars suit for bodily injury . . . unless the injury either is permanent as opposed to 'soft-tissue,' or requires treatment with a cost or equivalent value of $200." *Rybeck v. Rybeck*, 141 N.J. Super. 481, 488, 358 A.2d 828, 832 (Law Div. 1976). Similarly, the Pennsylvania No-fault Motor Vehicle Insurance Act, 40 Pa. Stat. Ann. § 1009.301(a)(5)(B) (repealed 1984) (Purdon Supp. 1987), permitted only those victims whose medical expenses exceed $750 to sue in tort. *Singer v. Sheppard*, 464 Pa. 387, 403, 346 A.2d 897, 905 (1975). Both statutes were upheld in the face of numerous constitutional challenges, including the discriminatory deprivation of tort recovery for victims

of lesser injuries. The state courts determined that such a distinction served a legitimate state purpose:

> [A]uto accident injury claims were reasonably seen by the Legislature to present a special problem requiring reform. It was that class of claims that created the calendar congestion, that ate up the investigative and administrative insurance dollar, that represented justice worst delayed, and that most invited compensation without fault determination.

Rybeck, 141 N.J. Super. at 498, 358 A.2d at 837. Further, the state courts were convinced that the discrimination against victims of minor injuries created a classification that was rationally related to the achievement of the legitimate state purpose. *See Singer*, 464 Pa. at 403, 346 A.2d at 905. So am I. Wresting the adjudication of minor injuries from state courts and assuring those victims of a certain and sure recovery through the insurance system is rationally related to the state's purpose of relieving an overburdened court docket. This method of case-management bears no resemblance to one that simply deprives one class of litigants of a potentially exculpatory defense. Any victim whose injuries reach the threshhold amount is entitled to go to court and present his negligence claim like any other tort plaintiff; and the defendant is entitled to use all common law defenses available. Thus, dockets are streamlined without either party losing any legal right.

21. According to Judge Weis, workers' compensation programs share with no-fault auto insurance plans "[the common goal] of simplifying the fact-finding process and thus making it easier for victims to recover." Weis at 25. This is not my understanding of the goal of workers' compensation

statutes. I had always learned that they were developed as a kind of social insurance based on the policy decision that the compensation of workers' injuries should be absorbed by the employer as a cost of doing business. *See New York Cent. R. Co. v. White*, 243 U.S. 188, 205 (1917). Furthermore, I do not think that the classification created by the workers' compensation statutes even represents a useful analogy to the *Beshada-Feldman* classification. Workers' compensation statutes create a classification based on the ongoing *relationship* between the employer and the employee, not on the personal (or corporate) identities of those parties outside of that relationship. Manufacturers of asbestos owe no greater duty to their employees under these statutes than do purveyors of paper clips. Workers' compensation statutes are analogous to inter-familial tort immunity and guest-host statutes, but not to the discriminatory treatment of asbestos manufacturers challenged here.[7]

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7. Judge Weis' observation that "the doctrine of strict liability . . . is in itself a classification that imposes discriminatory liability on a particular group of defendants," Weis at 24, is similarly misleading. Restatement (Second) of Torts, § 402A (1965), sets out a special standard of strict liability to be used by consumers against retailers and manufacturers. This special standard is not discriminatorily applied to such defendants because of who they are, however, but because of what they do, *i.e.*, put products into the stream of commerce. It is the activity, not the particular defendant, that triggers the application of strict liability. If the same defendant injures an individual through a means other than product manufacture and distribution, in a mundane slip and fall action, for example, that defendant will be liable for negligence only. Differential regulation of different *kinds* of activities pervades tort law and all other areas of public and private law, from criminal law to conflict of interests. Furthermore, strict liability is not exclusively reserved for use against miscreant manufacturers and retailers, but is also available for use against participants in "abnormally dangerous activities." *See* Restatement (Second) of Torts § 520 (1977).

D.

22. The final "legitimate state purpose" advanced by Judge Weis is the reduction of jury confusion through the complete elimination of the state-of-the-art defense in asbestos cases. The *Beshada* court had observed that "vast confusion . . . is virtually certain to arise from any attempt to deal in a trial setting with the concept of scientific knowability," *Beshada*, 90 N.J. at 207, 447 A.2d at 548, and that "discussion of state-of-the-art could easily confuse juries into believing that blame-worthiness is at issue." *Id.* This confusion does not stem from the nature of asbestos litigation, however, but from the interplay of the strict liability failure-to-warn action with the state-of-the-art defense. *See Beshada*, 90 N.J. at 204, 447 A.2d at 546. The likelihood of jury confusion provides a justification for one of two paths not taken by the New Jersey Supreme Court: (a) the elimination of a strict liability cause of action requiring the defendant to warn of the unknown and unknowable through the reversal of *Freund* and *Beshada*; or (b) the continued unavailability of the state-of-the-art defense to any defendant in a strict liability failure-to-warn action. The New Jersey Supreme Court balked and refused to make this difficult choice. The jury confusion rationale is, in my opinion, totally undermined by the New Jersey Supreme Court's recent decision in *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466 (1986), holding that punitive damages were available to plaintiffs against asbestos defendants in strict liability failure-to-warn cases. The evidence introduced to determine a punitive damages award is the very same evidence -- the state of scientific knowledge at the time of manufacture -- that is relied upon in a state-of-the-art defense. Thus, if jury confusion is to be minimized by the exclusion of such evidence, the *Fischer* rule is sure to restore that

confusion by the introduction of such evidence. I think the *Fischer* holding is fatal to the jury confusion rationale.

CONCLUSION

23. My position by no means constitutes the establishment of tort law for New Jersey. It simply means that since New Jersey common law is subject to the operation of the Equal Protection Clause, that clause quite plainly works to bar New Jersey from depriving asbestos manufacturers *alone* of the state-of-the-art defense, a defense that is available to all other manufacturers in products liability cases. The Supreme Court of New Jersey simply cannot establish a law that violates the Federal Constitution. And this court cannot look the other way and ignore its duty to defend that Constitution.

24. My answer to the question presented is that the judicially imposed denial of the state-of-the-art defense to manufacturers of asbestos-containing products does constitute a violation of the Equal Protection Clause of the Constitution.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5236, 86-5237 & 86-5370

IN RE: ASBESTOS LITIGATION

Raymark Industries, Inc. Appellant in No. 86-5236

IN RE: ASBESTOS LITIGATION

DANFIELD, ET AL V. JOHNS-MANVILLE SALES CORP., ETC.,

Owens-Illinois, Inc., Keene Corporation, Pittsburgh-Corning Corporation, The Celotex Corporation, Armstrong Cork Company, Eagle-Picher Industries, Inc., Owens-Corning Fiberglas Corporation, and Fibreboard Corporation,
Appellants in No. 86-5237

IN RE: ASBESTOS LITIGATION

JOHN W. GREGORY AND ZELDA F. GREGORY, HIS WIFE, ZELDA F. GREGORY, ADMINISTRATRIX AND ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF JOHN W. GREGORY, DECEASED; ZELDA F. GREGORY, INDIVIDUALLY; AND BRIAN GREGORY, A MINOR BY HIS NATURAL PARENT AND GUARDIAN ZELDA F. GREGORY

v.

GENERAL MOTORS CORPORATION, JOSEPH DOE, TOM DOE, HARRY DOE, ROBERT DOE, KEN DOE, DANIEL DOE, LARRY DOE, EDWARD DOE, SAM DOE, JACK DOE, FRED DOE, VINCE DOE,

General Motors Corporation,
Appellant in No. 86-5370

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Nos. 82-4031 & 85-381)

Present: WEIS, BECKER, and HUNTER,
Circuit Judges

ORDER AMENDING OPINION

It is ORDERED that the slip opinion filed in the above captioned case is amended as follows:

The sentence at the beginning of the first paragraph on page 24 is amended to read, "Although we find the *Fisher* case troubling, we once again acknowledge our limited function in reviewing cases of this type."

BY THE COURT,

/s/ Joseph F. Weis, Jr.

Circuit Judge

DATED: September 28, 1987

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 86-5236, 86-5237 & 86-5370

IN RE: ASBESTOS LITIGATION

Raymark Industries, Inc.
Appellant in No. 86-5236

IN RE: ASBESTOS LITIGATION

DANFIELD, ET AL V. JOHNS-MANVILLE
SALES CORP., ETC.,

Owens-Illinois, Inc.,
Keene Corporation,
Pittsburgh-Corning Corporation,
The Celotex Corporation,
Armstrong Cork Company,
Eagle-Picher Industries, Inc.,
Owens-Corning Fiberglas Corporation,
and Fibreboard Corporation,
Appellants in No. 86-5237

IN RE: ASBESTOS LITIGATION

JOHN W. GREGORY AND ZELDA F. GREGORY, HIS WIFE, ZELDA F. GREGORY, ADMINISTRATRIX AND ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF JOHN W. GREGORY, DECEASED; ZELDA F. GREGORY, INDIVIDUALLY; AND BRIAN GREGORY, A MINOR BY HIS NATURAL PARENT AND GUARDIAN ZELDA F. GREGORY

v.

GENERAL MOTORS CORPORATION, JOSEPH DOE, TOM DOE, HARRY DOE, ROBERT DOE, KEN DOE,

DANIEL DOE, LARRY DOE, EDWARD DOE, SAM DOE, JACK DOE, FRED DOE, VINCE DOE,

General Motors Corporation,
Appellant in No. 86-5370

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil Nos. 82-4031 & 85-381)

Before: WEIS, BECKER, and HUNTER,
Circuit Judges

ORDER AMENDING OPINION

It is ORDERED that the slip opinion filed in the above captioned case is amended as follows:

On page 3 the following is to be inserted before "Opinion of the Court."

Alan M. Darnell, Esquire
Christopher M. Placitella, Esquire
Wilentz, Goldman & Spitzer, P.C.
Plaza No. 9 Building
900 Route 9, P.O. Box 10
Woodbridge, New Jersey 07095

Attorneys for Amicus Curiae,
on behalf of various plaintiffs -
approximately 1000 individuals.

BY THE COURT

Joseph F. Weis, Jr.

Circuit Judge

Dated: October 8, 1987

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

C.A. Misc. Record No. 86-8017
(NJ D.C. Civil No. 82-4031)

ZELDA F. GREGORY, *et al.*

—vs.—

GENERAL MOTORS CORPORATION,

Petitioner.

Present:

HUNTER and MANSMANN,

Circuit Judges.

1. Petition for Permission to Appeal from an Interlocutory Order pursuant to 28 U.S.C. § 1292(b),
2. Disclosure statement for petitioner,

in the above-entitled case.

Respectfully,

[ILLEGIBLE]
Deputy Clerk
597-3080

enc.
ks

P.S. Petitioner refers to previous petitions at Nos. 86-5236 and 86-5237, *see* C109 and C110.

The foregoing Motion is GRANTED.

By the Court,

[ILLEGIBLE]
Judge

Dated: May 13, 1986

ks/cc: John C. Heavey, Esquire
James C. Gavin, Esquire

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

C.A. Misc. Record No. 86-8012
(NJ D.C. Misc. No. 85-381)

March 7, 1986

IN RE: ASBESTOS LITIGATION

Danfield, et al.,

—VS.—

Johns-Manville, Sales Corp., etc., et al., Owens-Illinois, Inc., Keene Corp., Pittsburgh-Corning Corporation, The Celotex Corporation, Armstrong Cork Company, Eagle-Picher Industries, Inc., Owens-Corning Fiberglas Corporation, and Fibreboard Corporation,

Petitioners.

Present:

HUNTER and MANSMANN,

Circuit Judges.

1. Petition for Permission to Appeal from an Interlocutory Order pursuant to 28 U.S.C. Section 1292(b),

*2. Respondents' reply to petition for permission to appeal,

in the above-entitled case.

---

* Please see transmittal letter in No. 86-8011 also sent this date.

Respectfully,

[ILLEGIBLE]
Deputy Clerk 7-5019

enc.
ad

The foregoing Motion is GRANTED.

A TRUE COPY:
[ILLEGIBLE]
Deputy Clerk

By the Court,

[ILLEGIBLE]
Judge

Dated: March 26, 1986
ad/cc: All Counsel

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

C.A. Misc. Record No. 86-8011
(NJ D.C. Misc. No. 85-381)

March 7, 1986

IN RE: ASBESTOS LITIGATION

Raymark Industries, Inc.,

Petitioner.

Present:

HUNTER and MANSMANN,

Circuit Judges.

1. Petition for Permission to Appeal from an Interlocutory Order pursuant to 28 U.S.C. Section 1292(b),

2. Respondents' reply to petition for permission to appeal,

in the above-entitled case.

Respectfully,

[ILLEGIBLE]

Deputy Clerk 7-5019

enc.
ad

The foregoing Motion is GRANTED.

A TRUE COPY:
[ILLEGIBLE]
Deputy Clerk

By the Court,

[ILLEGIBLE]
Judge

Dated: March 26, 1986
ad/cc: All Counsel

[774]

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Feb. 14, 1986

IN RE ASBESTOS LITIGATION

Misc. No. 85-381

District court entered order consolidating its asbestos cases for limited purpose of a common, single adjudication of an issue. The District Court, Bissell, J., held that New Jersey common-law rule that the state-of-the-art defense is not available, against strict liability claim, to manufacturer of products containing asbestos does not violate equal protection rights of manufacturers.

Ordered accordingly.

Clarkson S. Fisher, *Chief Judge*, filed a dissenting opinion in which Lacey, Stern, Barry, Cowen, and Cohen, *JJ.*, joined.

OPINION

BISSELL, *District Judge*, writing for GERRY, BROTMAN, DEBEVOISE, SAROKIN, ACKERMAN, THOMPSON and RODRIGUEZ, *District Judges*.

I. *Introduction*

In many asbestos related actions pending before this Court, the issue of the availability of the "state-of-the-art" defense to manufacturers of asbestos products has been presented in pre-

trial motions.[1] These motions take the form of either an application by a plaintiff to strike such a defense from the pleadings or one by a defendant-manufacturer to allow the defense and the submission of evidence to support it. Because of rules developed in recent decisions of the **[775]** Supreme Court of New Jersey, apparently precluding that defense to strict liability claims in asbestos cases but permitting it in such actions involving other products, several defendants have argued that manufacturers of asbestos products are denied "the equal protection of the laws" of New Jersey in violation of the Fourteenth Amendment.[2]

That equal protection question presents a significant issue of constitutional law, not dependent upon the facts of a particular case. It has been raised in many asbestos cases pending before different judges of this Court. Therefore, it is the Court's desire to issue a ruling which will govern all such actions under the current state of New Jersey law. On October 11, 1985 this Court entered an Order consolidating all its asbestos cases for the limited purpose of a common, single adjudication of this issue. For the reasons set forth hereafter, this Court determines that under New Jersey law the state-of-the-art defense is not available, against a strict liability claim, to a defendant-manufacturer of products containing asbestos, and that this rule, even if limited only to such defendants, does not violate their "equal protection" rights.

---

1 In the present context, defendant-manufacturers would assert such a defense by introducing evidence that they neither knew nor should have known of the dangers of the asbestos contained in their products and therefore may not be charged in strict liability for a breach of any duty to warn of such dangers.

2 Federal jurisdiction in these matters is predicated upon diversity of citizenship. 28 U.S.C. § 1332. Accordingly, the applicable substantive law is that of New Jersey. *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

II. *The Law of New Jersey*

The history which has placed the Court in the present circumstances is well known to all involved with asbestos litigation in the State of New Jersey and accordingly will not be developed in great detail here. By way of brief review, we note the following:

In 1982 the New Jersey Supreme Court decided *Beshada v. Johns-Manville*, 90 N.J. 191, 447 A.2d 539 (1982), which expressly rejected the "state-of-the-art" defense in strict liability/failure to warn cases. However, on July 30, 1984, that same Court decided *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984), in which it dramatically altered this position. In *Feldman*, the Supreme Court ruled that actual and constructive knowledge of a defendant are relevant factors in determining whether it is strictly liable in a failure to warn case. However, the Court expressly refused to overrule *Beshada*. Instead, the Court restricted *Beshada* "to the circumstances giving rise to its holding." 97 N.J. at 455, 479 A.2d 374.

One month after *Feldman*, and in reliance on that decision, Owens-Illinois, an asbestos manufacturer, in a case entitled *Heckman v. Johns-Manville*, pending in the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-2470-81, filed a motion *in limine* to permit it to introduce evidence at trial demonstrating its lack of actual and constructive knowledge regarding the health hazards its its product posed to users. Recognizing the importance of the issue for hundreds of other asbestos cases pending in this state, the Honorable John E. Keefe, *sua sponte*, entered an Order noticing the motion under the general caption *In the Matter of Asbestos Litigation Venued In Middlesex County*, Docket No. L-52237-81, and invited the asbestos bar to file briefs and participate in oral argument.

Judge Keefe, after hearing oral argument on September 10, 1984, denied the motion on the ground that in light of *Beshada* and its treatment in *Feldman*, an asbestos manufacturer, under New Jersey law, was prohibited from relying on the state-of-the-art defense.

Defendant Owens-Illinois then moved before the Superior Court, Appellate Division, for leave to appeal the trial court's ruling and simultaneously petitioned the New Jersey Supreme Court for direct certification. On December 5, 1984, the Supreme Court entered an Order granting the request for direct certification and further:

> ORDERED that leave to appeal is granted, and this Court, in *Feldman v. Lederle Laboratories*, 97 N.J. 429 [479 A.2d 374] (1984), having recognized that *Beshada v. Johns-Manville*, 90 N.J. 191 [447 A.2d 539] (1980) [*sic*], applies to all **[776]** pending asbestos cases, the September 21, 1984 Order of the Superior Court, Law Division, (L-52237-81) is summarily affirmed.

In the Matter of Asbestos Litigation Venued In Middlesex County, 99 N.J. 201, 491 A.2d 700 (1984).

Thereafter, Owens-Illinois petitioned the New Jersey Supreme Court for a rehearing. The petition specifically sought clarification of the word "pending". On December 19, 1984, the motion for rehearing was denied and forwarded to counsel with a cover letter from the Clerk of the New Jersey Supreme Court which stated:

> The request has been denied essentially because Judge Keefe's interpretation that the Court's prior order applies to *all* pending asbestos cases was correct. [Emphasis in original].

III. *Equal Protection*

One aspect of defendants' equal protection argument can be disposed of without extensive analysis. The application for rehearing before the Supreme Court of New Jersey focused upon a requested construction of the term "pending" as the term was employed in the Supreme Court's Order of December 5, 1985, *supra*. Since that term was not in fact clarified, either by the Order denying that motion for rehearing or by the covering letter from the Clerk of the Court, defendant-manufacturers argue before us that the use of the term "pending" by the Supreme Court of New Jersey establishes classifications within the asbes-

tos cases themselves which deny equal protection of the laws to some defendants, in some cases, based solely upon the filing date of a particular action. Several possible constructions of the term "pending" and the date to which that term might be attributed have been posited by these defendants to this Court. We believe, however, that defendants' construction of the term "pending" is misplaced. In December 1984, the Supreme Court of New Jersey could only rule as to cases then in existence (or "pending") under current New Jersey law. This Court believes that the New Jersey Supreme Court carefully chose the term "pending," later emphasized by its Clerk as being "*all* pending", to encompass all asbestos litigation governed by the present state of New Jersey law. In the fourteen months since December 1984, that law regarding the state-of-the-art defense at issue here has not changed. Accordingly, there are no classifications among asbestos cases *presently* "pending" in New Jersey, either in state or federal court. No viable equal protection argument can be posited upon such alleged (but non-existent) classifications.

This Court now turns its attention to the more serious question of whether asbestos defendants, when compared to other defendant-manufacturers in strict liability/failure to warn cases, are denied equal protection of the laws of New Jersey.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161-62, 25 L.Ed.2d 491 (1970).

As the application of *Beshada* to the defendants involves both the areas of economics and social welfare, and "neither apportions benefits and burdens on the basis of a 'suspect classification' nor impinges on 'fundamental interests,' it violates equal protection only if it bears no rational relationship to a le-

gitimate state purpose." *Delaware River Basin Commission v. Bucks County Water & Sewer Authority*, 641 F.2d 1087, 1092 (3d Cir.1981) (citing *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976)). In *Vance v. Bradley*, 440 U.S. 93, 97, 99 **[777]** S.Ct. 939, 942-43, 59 L.Ed.2d 171 (1979), (footnotes omitted), the Court detailed this standard:

> . . . [C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

Equal (if not greater) caution should be exercised in assessing whether decisions of a state Supreme Court have denied equal protection of the laws.

The rationality test requires the Court to conduct a two-step analysis. "First, it should identify the purposes of the statute [or as here, common law rule] and assure itself that these purposes are legitimate . . . Second, having identified the governmental purposes, the court must determine whether the classification is rationally related to achievement of these goals." *Delaware River*, *supra* at 1092-3.

In identifying the purposes behind the *Beshada/Feldman* dichotomy, the court may look to both an articulated purpose and "general public knowledge about the evil sought to be remedied, prior law, accompanying legislation, and formal public pronouncements." *Id.* at 1093, n. 9. In addition, "in the absence of an articulated purpose in the legislation or in its history, courts have upheld challenged provisions that furthered

the attainment of goals either suggested by the parties or postulated by the reviewing court itself." *Id.* at 1094.

While the Supreme Court's Order affirming Judge Keefe's opinion in *In the Matter of Asbestos Litigation Venued In Middlesex County* does not articulate the purposes behind treating asbestos cases differently than others, other data for ascertaining them does exist. The first is found in the *Feldman* decision itself:

> In our opinion *Beshada*, *supra*, would not demand a contrary conclusion in the typical design defect or warning case. If *Beshada* were deemed to hold generally or in all cases, particularly with respect to a situation like the present one involving drugs vital to health, that in a warning context knowledge of the unknowable is irrelevant in determining the applicability of strict liability, we would not agree. Many commentators have criticized this aspect of the *Beshada* reasoning and the public policies on which it is based. [Citations omitted]. The rationale of *Beshada* is not applicable to this case. We do not overrule *Beshada*, but restrict *Beshada* to the circumstances giving rise to its holding. *See, e.g., Friedman v. Podell*, 21 *N.J.* 100, 105 [121 A.2d 17] (1956); *Konrad v. Anheuser-Busch, Inc.*, 48 *N.J.Super.* 386, 388 [137 A.2d 633] (Law Div.1958) ("Cases state principles but decide facts, and it is only the decision on the facts that is binding precedent.").

97 N.J. at 454-55, 479 A.2d 374.

As Judge Keefe stated regarding *Feldman's* treatment of *Beshada*:

> [The New Jersey Supreme Court] said that, "The rationale of *Beshada* is not applicable to this case," and when I say to this case they mean the rationale of *Beshada* is not applicable to the general typical liability case. "We do not overrule *Beshada* but restrict *Besahda* to the circumstances giving rise to its holding" and they use the word circumstances as opposed to facts because there were no facts which were decided in *Beshada* or the cases that were joined with it.

> The word circumstances has even broader meaning I think than the word fact. There are circumstances about *Beshada* which I think might conceivably be applied to other types of product litigation if not in New Jersey certainly in the United States. *The circumstances* **[778]** *of Beshada, when you consider the presence of amicus on the part of all litigants is that we have a vast number of people who are injured by a specific product, the injury is brought about over a long latency period and because of those factors and circumstances it is difficult, both for Plaintiffs and Defendants, to intelligently try the issue of state of the art.*
>
> In justification for his reasoning in the opinion Justice Pashman pointed to the fact finding process as being one of the most difficult considerations for a trial Court and jury in that setting. I think he meant it to apply to a much broader setting but in terms of rationalizing why *Beshada* was not overruled *it seems to me that one of the factors and circumstances certainly is the question of how difficult it would be in a multiple defendant, multiple plaintiff case, for a jury to come to some conclusion that at one point in time one defendant knew and another didn't, whether it was in point of time that the actual injury occurred, things of that nature.*

In the Matter of Asbestos Venued In Middlesex County, transcript of proceedings of September 9, 1984, pp. 94-95. (Emphasis added).

Judge Gerry of this Court, prior to the New Jersey Supreme court's affirmance in the Middlesex County litigation, addressed the equal protection argument in the case of *Gogal v. Johns-Manville*, 595 F.Supp. 971. (1984). In finding that there was no equal protection violation, he reasoned:

> Looking generally at tort law, this court recognizes numerous distinctions made between classes of litigants. Under the New Jersey Tort Claims Act, for example, governmental entities and officers are at a distinct advantage

over private actors. Non-medical-malpractice plaintiffs, . . . are somewhat more favorably treated by New Jersey courts than malpractice claimants. The whole workmen's compensation scheme places both employers and employees in a position different from those involved in non-job-related accidents. There is nothing constitutional about any of the above examples. All of them are the result of legitimate policy decisions of New Jersey (and other states).

Looking at tort law generally, there is a huge distinction made between those defendants subjected to strict liability and those against whom plaintiffs are only entitled to prove negligence. Again, the courts have acted on the basis of public policy. Indeed, *Feldman* itself is basically a case dealing with the reasons to subject or not subject drug manufacturers to strict liability. Clearly, the chasm between strict liability defendants who may advance a state of the art defense and those who may not is not nearly so wide as the chasm between defendants subjected to strict liability and those who are not.

It needs hardly be stated that asbestos cases are like no other products liability cases in terms of their volume and difficulty, as well as the massive societal problem they manifest. This alone, we believe warrants the distinction made by the Feldman Court.

Gogol at 974-75. (Emphasis added). See also the very recent case of *Spring Motors Distribution, Inc. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), in which the New Jersey Supreme Court held that in a case involving solely economic loss due to a non-conforming product, between two commercial companies similarly situated, neither negligence nor strict liability was available to a plaintiff-purchaser as a basis for his action, only warranty theories.

The asbestos litigation has revealed the vast exposure of thousands of people, decades ago, through numerous different contacts, with products made by many manufacturers, resulting

in latent injury detected 30 years and more after exposure, where evidence of actual or constructive knowledge will undoubtedly create widely differing circumstances between various defendants. These factors combine to create a situation where legitimate concerns of case management, economics, and social **[779]** welfare and policy regarding exposed persons and their families amply justify a rule precluding the state-of-the-art defense in these atypical products liability cases. This decisional rule evolving from such considerations of public policy is indeed similar to the legislative decision in workers' compensation matters, imposing liability without proof of fault (or the defense of contributory fault) upon the employer, unlike that imposed upon other defendants to claims resulting from the very same work-related injuries.[3] Furthermore, these considerations in support of the *Beshada* rule are so self-evident for asbestos cases that the New Jersey Supreme Court's failure to articulate them in its ruling of December 1984 is not fatal. Asbestos cases are different than typical products liability cases and treating them as such under different rules of law is permissible.

The purposes then, as this Court sees them, for treating asbestos cases differently than typical products liability cases are to ease jury confusion and resulting prejudice to litigants, and to expedite trial of the issues, both of which are areas in which a state Supreme Court has traditionally played a leading role. As Judge Keefe stated, asbestos cases involve "a vast number of people who are injured by a specific product, the injury is brought about over a long latency period and because of those

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3 Workers' compensation statutes have withstood other equal protection attacks. *Lower Vein Coal Company v. Industrial Board*, 255 U.S. 144, 41 S.Ct. 252, 65 L.Ed. 555 (1921); *New York Central Railroad v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917); *Davidson v. Hobart Corp.*, 643 F.2d 1386 (10th Cir.1981). There is no reason to believe that the feature of workers' compensation regarding an employer's liability violates such a defendant's equal protection rights.

factors and circumstances it is difficult, both for plaintiffs and defendants, to intelligently try the issue of state of the art." *In the Matter of Asbestos Litigation Venued in Middlesex County, supra*, transcript at 94-5. In addition, there is the difficulty in a multiple defendant case "for a jury to come to some conclusion that at one point in time one defendant knew and another didn't [that their products posed potential health hazards]." *Id.* at 95. That difficult jury function is compounded when the task of determining when the plaintiffs' exposure occurred is included in the equation. While it is true that none of these variables is exclusive to asbestos cases, it is equally true that in such cases all of them come together in one action at one time.

Creating a common law rule, which prevents a defendant in an atypical products liability case such as asbestos litigation from relying on the state-of-the-art defense, eases the jury's burden by removing voluminous and often conflicting testimony concerning the knowledge possessed by the industry as a whole, and by each individual defendant in particular, on a myriad of different, remote dates. It thus serves to facilitate the trial of each of these numerous cases by removing an issue which, as stated earlier, is very difficult for the jury to grasp and fairly adjudicate as to each defendant separately.

Having identified what this Court feels are the purposes behind treating asbestos cases differently than typical cases, and having assured itself that those purposes are legitimate, the Court must now determine whether the *Beshada/Feldman* dichotomy is rationally related to the achievement of those goals. It is this Court's determination that there is a rational relationship. Eliminating the issue of the state of the art, for the reasons set forth above, is an appropriate rule for minimizing jury confusion (and resulting error regarding a particular defendant's responsibility) and expediting the trial of the hundreds of cases filed in this state.

Accordingly, this Court determines that the *Beshada/Feldman* dichotomy has a "reasonable, rational basis" and as such does not violate the equal protection clause of the Fourteenth Amendment. This Opinion and the enclosed Order implementing it shall be filed in and shall govern each asbestos

action presently pending in this District. This decision shall have no retro**[780]**active effect upon any asbestos cases previously adjudicated or otherwise disposed of, and may not serve as a ground for the reopening of any such concluded action. On the Court's own motion, a determination of the suitability of an interlocutory appeal to the United States Court of Appeals for the Third Circuit, pursuant to 28 U.S.C. § 1292(b), is included in the enclosed Order.

CLARKSON S. FISHER, *Chief Judge*, dissenting.

I respectfully dissent because I feel the majority opinion misses the mark in its application of equal-protection law by attempting to distinguish asbestos litigation from other strict-liability warning cases and in other particulars which are detailed below.

At the outset, I am hesitant to find a denial of equal protection arising out of the rulings in *Beshada v. Johns-Manville*, 90 N.J. 191, 447 A.2d 539 (1982), *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984), and *In the Matter of Asbestos Litigation Venued in Middlesex County*, 99 N.J. 201, 491 A.2d 700 (1984). *Vance v. Bradley*, 440 U.S. 93, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979), counsels deference to the government where its actions are challenged on equal-protection grounds since "even improvident decisions will eventually be rectified by the democratic process." *Id.* at 97, 99 S.Ct. at 942. In the unusual situation before us, however, where we are called upon to review a judge-made rule of law, the efficacy of the checks and balances inherent in the "democratic process" is substantially reduced. In my view, therefore, our deference to the state court should be tempered and our application of the rationality test sharpened accordingly.

Furthermore, it must be remembered throughout that this is exclusively a fourteenth amendment controversy, therefore disagreement relating purely to underlying policy considerations has no rightful place in the discussion, nor can it be cloaked in the guise of equal-protection doctrine. Only sound constitu-

tional arguments can be heard in objection to the majority's conclusion.

As a final preliminary note, it should be stated that the issue before the court poses a genuinely troubling dilemma. The debate hinges on whether a real and substantial difference separates defendants in asbestos-related, failure-to-warn products-liability actions from those in all other failure-to-warn cases. *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971). We can go two routes. If such a difference exists, asbestos firms are denied a potentially exculpatory defense which the New Jersey Supreme Court has itself expressly held available in other strict-liability contexts. *Feldman*, 97 N.J. at 451-52, 479 A.2d 374; *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983) (state-of-the-art evidence is relevant in design-defect cases). If, on the other hand, the difference is nonexistent, we are inexorably drawn to the conclusion that the New Jersey Supreme Court has blinked on the doctrine of equal protection. Neither result is appealing. Nevertheless, reason, experience, common sense, and the Constitution dictate that we choose the second, and perhaps less-travelled, route, regrettable though it may be to disagree with the state's highest court.

There can be no argument with the constitutional framework employed by the majority. Under traditional analysis, *Beshada/Feldman* denies equal protection only if there is no legitimate state purpose rationally promoted by the challenged classification. *Western & Southern Life Insurance Co. v. California State Board of Equalization*, 451 U.S. 648, 668 101 S.Ct. 2070, 2083, 68 L.Ed.2d 514 (1981); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16, *rehearing denied*, 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418 (1973).

My opposition originates in the soft and uncritical application of rule to fact. For satisfaction of the "legitimate purposes" requirement, the majority relies expressly on nothing more than the elimination of **[781]** jury confusion and the expedition of trials. These are certainly significant objectives in any setting, but here those reasons simply are not enough to rebut a

challenge on constitutional grounds where the underlying tort liability at stake is particularly high. In this regard, the opinion conspicuously lacks citation to case law for the critical proposition that such relatively slight goals have been, or can be, recognized as sufficient "legitimate state purposes" in an equal-protection setting. In addition, the reference to "legitimate concerns of case management, economics, and social welfare and policy," at page 11 is undeveloped. It does little to truly differentiate asbestos from other difficult tort litigation or to rationalize the severe outgrowth of the proffered distinction.

It is also merely conjecture that elimination of state-of-the-art evidence will streamline litigation and reduce jury confusion. There has been no data to support the majority's assertions in this regard. Indeed, in *Wolf v. Procter & Gamble*, 555 F.Supp. 613 (D.N.J. 1982), it was held that state-of-the-art is a valid defense to negligence claims. Such evidence is also relevant to the consideration of punitive damages. Thus, state-of-the-art evidence may well find its way into asbestos trials regardless of *Beshada/Feldman*. Confusion would then be compounded, not reduced, since jurors would be required first to distinguish strict liability from negligence and then to discretely apply the state-of-the-art evidence only to the latter. Severance might avoid these results, but at the same time defeat the original aim of streamlining trial of the issues. In sum, accommodation of juries, though praiseworthy, carries little weight in the equation.[1]

The equal-protection test's second element, too, is not sufficiently treated by the majority. In the single paragraph—indeed, the single sentence—devoted to this subject at page 13, the majority seems to assume rather than to identify and explain a rational relationship between the legitimate state purposes and the segregation of asbestos defendants. Aside from

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1 Not to be overlooked in this discussion of unburdening the jury is the distinct possibility that asbestos cases will be tried to the bench. Taking for granted the competence and acuity of the state and federal bench in New Jersey, the argument regarding simplification of the issues for the trier of fact therefore goes largely for naught.

expedience, a term employed by the majority at page 779 and one not known for its positive connotations, I am unable to discern from the opinion or to imagine of my own the necessary connection bridging means and ends.

Accordingly, in the absence of a stronger argument to satisfy both elements of the equal-protection formula, I am constrained to conclude that by prohibiting asbestos defendants from introducing state-of-the-art evidence the Supreme Court of New Jersey violates the fourteenth amendment.

Further considerations also compel my view of this matter. I disagree, for one, with the majority's assessment that asbestos actions are "self-evidently" and substantially different from other products cases. Looks are deceiving, in litigation as in life; thus, no surer trap can be set than for a court to judge a suit by the code number[2] it bears. I refer specifically to three areas in which the majority itself, and through its incorporation of decisions by Judge Gerry[3] and Judge Keefe,[4] seeks support for the distinctive treatment of asbestos: (1) volume of cases, (2) numerosity of parties, and (3) complexity of issues.

The volume of asbestos cases on court dockets[5] is absolutely irrelevant to consid**[782]**eration of the present equal-protection challenge. "The constitutional imperatives of the Equal Protection Clause cannot be satisfied by mere conjecture as to administrative convenience." *Frazier v. Manson*, 703 F.2d 30, 35 (2d Cir.), *cert. denied*, 464 U.S. 934, 104 S.Ct. 339, 78 L.Ed.2d 308 (1983). More to the point, however, is the realization that if, as

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2 All asbestos cases commenced in the District of New Jersey are marked by the court clerk with the distinctive computer code number 368.

3 *Gogol v. Johns-Manville*, 595 F.Supp. 971 (1984).

4 *In the Matter of Asbestos Litigation Venued in Middlesex County*, Superior Court of New Jersey, Law Division, Docket No. L-52237-81, transcript of proceedings of Sept. 9, 1984.

5 The district court clerk reports that approximately 133 asbestos-related cases were pending in the District of New Jersey as of January 1, 1986. The court's full docket consisted of 5,570 civil actions, thus 2.3% were asbestos related.

the majority premises, the elimination of juror confusion and resultant prejudice is at the core for precluding state-of-the-art evidence, what difference does it make then whether the court's docket lists one or a million and one asbestos actions? One jury will, in most instances, decide but one case. And it matters not one iota to Monday's jury that a million asbestos cases will still remain on Tuesday, nor does such knowledge contribute one measure of confusion to that panel's deliberation. As Owens-Illinois, Inc. astutely observes in its brief[6] on these issues, it would appear that there are more routine auto accident cases than asbestos cases in the courts, yet the many motorists in litigation are not denied the right to prove, for example, comparative negligence on the scant basis of their prolific numbers.

As for the majority's point concerning the abundance of plaintiffs and defendants in the asbestos cases, it must be noted that not every action is a multi-party behemoth. To be sure, there are cases where the parties are almost innumerable. But there are also instances where the named plaintiffs and defendants can each be counted on one hand. *E.g., Miller v. Johns-Manville*, Civil Action No. 85-389 (husband and wife v. five named defendants); *Gregory v. General Motors Corp.*, Civil Action No. 82-4031 (administratrix and son v. one named defendant). Where in these smaller cases is the danger in permitting a jury to weigh the evidence of the actual and constructive knowledge of the handful of defendants who comprise the chain of asbestos distributors? I see none. Thus, the majority's overly broad numerosity argument is misplaced and the New Jersey Supreme Court's preclusion of state-of-the-art evidence constitutes needless and prejudicial overkill.

Now of course the majortiy is concerned lest the cumulative effect of complicated legal theories, multiple parties, and prolonged latency of injury overwhelm our juries. But even at its hypothetical worst, the danger is not so extreme as to warrant

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6 See Memorandum of Law in Support of Motion of Defendant Owens-Illinois, Inc. to Admit Evidence Relating to its Actual or Constructive Knowledge of the Potential Hazards of its Product submitted to Judge Sarokin in *Valori v. Johns-Manville Sales Corp.*, Civil Action No. 82-2686.

the pre-emptive strike against the asbestos litigants' defensive arsenal. Fundamental fairness must prevail over cures that are worse than the disease. The proper remedy for projected jury confusion, prejudice, or delay is not arbitrary and radical excision of potentially dispositive evidence, but rather time-tested methods including thoughtfully prepared jury instructions and charges, well-organized presentation of all evidence, expert testimony, and other ingredients which make up a well-tried case.

Even if it were agreed that juror confusion and facilitation satisfy the rationality test, I am not entirely convinced that it is proper for us to ascribe these purposes to the New Jersey Supreme Court. Admittedly, *Delaware River Basin Commission v. Bucks County Water & Sewer Authority*, 641 F.2d 1087 (3d Cir. 1981), permits us to hypothesize as to the purposes behind a classification. But, in that very same opinion, the circuit court also recognized that the "Supreme Court has sometimes indicated that rationality analysis must consider the actual purposes of the legislature, rather than post hoc justifications offered by government attorneys or hypothesized by the court itself." 641 F.2d at 1094. The United States Supreme Court has often looked for an actual articulation of the state's purposes where the subject matter at hand was unusually sensitive or troublesome. *See, e.g., San Antonio School District*, 411 U.S. at 17, 44-52, 93 S.Ct. at 1288, 1302-06; *McGinnis v. Royster*, 410 U.S. 263, 270-71, 93 S.Ct. 1055, 1059-60, 35 **[783]** L.Ed.2d 282 (1973). Thus, where a decision (1) emanates from a court and is therefore not readily susceptible to the aforementioned correctives of the democratic process, and (2) has generated substantial critical commentary,[7] I do not feel it improper to impose an articulation requirement. Since my reading of the cases reveals no express or implied explanation for the discriminatory fence

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7 See Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U.L.Rev. 892, 901-04 (1983); Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 Geo.L.J. 1635, 1644-53 (1983); Note, *Products Liability—Strict Liability in Tort—State-of-the-Art Defense Inapplicable in Design Defect Cases*, 13 Seton Hall L.Rev. 625, 636-42 (1983).

raised around asbestos defendants, the failure of the New Jersey Supreme Court to disclose its rationale is, in and of itself, fatal to the distinction. There is simply no way to escape the reality of this state of affairs and the majority compounds and perpetuates an unfortunate error.

Judge Gerry has also commented on this issue in an earlier opinion, noted above, from which the majority quotes extensively. An important distinction must be drawn regarding those excerpted comments. In looking generally at tort law, Judge Gerry observed by way of example, that this court recognizes numerous distinctions made between classes of litigants under the New Jersey Tort Claims Act and Workers Compensation Act and in medical malpractice litigation. *Gogol* at 974-75. In none of these contexts though has the classification effectively stripped litigants of a substantive right without at the very least providing some procedural *quid pro quo*. Here, the New Jersey Supreme Court has withheld a theory, which, if proved, could conceivably relieve numerous defendants of liability, but offered no substitute or counter-measure. Had the court somehow "re-evened" the score between asbestos plaintiffs and defendants or made the latter's isolation less glaringly conspicuous, perhaps the *Beshada/Feldman* rule would be more palatable.

Furthermore, the majority has created a potential Pandora's Box at pages 11 and 12 with its usage of the phrase "atypical products liability case," by no means a synonym for "asbestos cases." Whatever *Beshada/Feldman* stands for, the damage should be kept to a minimum at all costs. Yet the imprecision that is brought to the opinion by the term "atypical"—however qualified it may be in context—unnecessarily opens the door for an extension of the challenged rule to an unforeseeable maze of applications.

Finally, the only point left for discussion is to surmise what in fact the New Jersey Supreme Court might have meant by the controversial language that restricted *Beshada* "to the circumstances giving rise to its holding." *Feldman*, 97 N.J. at 445, 479 A.2d 374. As stated above, I find judicial speculation in this area to be inappropriate; therefore, I will hazard no guess as to

what this phrase intends. I note only that had the supreme court actually wished the result reached by the majority, it could easily have said "state-of-the-art evidence is relevant in failure-to-warn cases but not where asbestos is involved," or "but not where the case is big and clumsy." The silence is indeed clanging.

In sum then, the New Jersey Supreme Court's classification of asbestos defendants should fall for a multitude of reasons, for in the supposed hope of reducing that prejudice generated by confusion, the court and today's majority achieve the very result they seek to avoid. Asbestos defendants are entitled to the same opportunity to be heard as manufacturers and distributors of all other products. The deprivation of this opportunity has the effect of inappropriately classifying these defendants and subjecting them to a different and harsher standard of liability by denying the chance to present relevant and probitive evidence.

The difficulty of the facts in a case is no ground for ignoring those facts. That is precisely what the majority proposes we do in our asbestos cases. Expedience is thereby exalted over fairness and justice is su**[784]**bordinated to simplicity. It is inconceivable that these results were intended by the New Jersey Supreme Court.

Judges LACEY,[8] STERN, BARRY, COWEN and COHEN authorize me to say that they join in this dissent.

On its own motion, on October 11, 1985, the court ordered that all cases in the District of New Jersey involving exposure to or use of asbestos be consolidated for the sole purpose of determining issues concerning the relationship among the New Jersey Supreme Court's decisions in *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982), and *Feld-*

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8 Judge Frederick B. Lacey participated in the court's consideration and determination of this matter on December 23, 1985. He resigned from the bench on January 31, 1986, prior to the filing of this opinion.

man v. Lederle Laboratories, 97 N.J. 429, 479 A.2d 374 (1984), and the Equal Protection Clause of the fourteenth amendment of the Constitution of the United States, the opinion of the court on these issues to become the law of the case for all cases in the asbestos litigation.

For the reasons stated in the accompanying opinion, the court determines that the aforementioned decisions together with *In the Matter of Asbestos Litigation Venued in Middlesex County*, 99 N.J. 201, 491 A.2d 700 (1984), do not violate the Equal Protection Clause of the fourteenth amendment; accordingly, it is, on this 14th day of February, 1986,

ORDERED that under New Jersey law the state-of-the-art defense is not available, against a strict-liability claim, to a defendant-manufacturer of products containing asbestos, and it is further

ORDERED that this rule shall henceforth be the law of the case for all cases in the asbestos litigation in the District of New Jersey.

Parties to asbestos actions in which motions pertaining to the state-of-the-art defense are pending as of this date are directed to submit appropriate orders to the judge to whom the action is assigned.

Motions subsequently made regarding this issue shall be submitted to the judge to whom the action is assigned and shall be disposed of in accordance with this order and accompanying opinion.

This decision shall have no retroactive effect upon any asbestos cases previously adjudicated or otherwise disposed of and may not serve as a ground for the reopening of any such concluded action.

On its own motion, the court is of the opinion that controlling questions of law have been presented regarding the constitutionality of the denial of the state-of-the-art defense to manufacturers of asbestos products in New Jersey. There is substantial ground for difference of opinion on this question and an immediate appeal from this order to the United States Court of Appeals for the Third Circuit, pursuant to 28 U.S.C.

§ 1292(b), may materially advance the ultimate termination of litigation. Any application for immediate interlocutory appeal from this order shall not result in a stay of proceedings in this court.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Misc. No. 85-381

IN RE: ASBESTOS LITIGATION

ORDER

On the Court's own motion, it is on this 11th day of October, 1985,

ORDERED that all cases in the District of New Jersey involving exposure to or use of asbestos are hereby consolidated for the sole purpose of determining issues concerning the relationship among the New Jersey Supreme Court's decisions in *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191 (1982) and *Feldman v. Lederle Laboratories*, 97 N.J. 429 (1984), and the Equal Protection Clause of the 14th Amendment of the Constitution of the United States.

The Opinion of the court on these issues shall become the law of the case for all lawsuits in the asbestos litigation. For all other issues and purposes, each of these cases shall retain its individual status and assignment.

CLARKSON S. FISHER

Chief Judge

FOR THE COURT

[334]

No. 81-2204

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

July 26, 1982

C. A. HARDY, et al.,

Plaintiffs-Appellees,

v.

JOHNS-MANVILLE SALES CORPORATION, et al.,

Defendants-Appellants.

[335] Rex Houston, Henderson, Tex., F. Scott Baldwin, Marshall, Tex., for plaintiffs-appellees.

Royal H. Brin, Jr., Dallas, Tex., for GAF Corp. and Ruberoid Co.

Stephen R. Patterson, Longview, Tex., for Eagle-Picher Industries, Inc.

Otto A. Ritter, Longview, Tex., for URARCO Ind., Inc.

J. Carlisle DeHay, Jr., Dallas, Tex., for Armstrong Cork Co.

Mike Hatchell, Tyler, Tex., for Nicolet.

Jeffrey S. Lynch, Dallas, Tex., for Raybestos-Manhattan, Inc.

T. John Ward, Longview, Tex., for Forty-Eight Insulations, Inc.

James W. Wray, Jr., Corpus Christi, Tex., for Garlock, Inc.

Clyde Bracken, Dallas, Tex., for Grefco, Inc.

James T. Foley, Tyler, Tex., for Crown Cork & Seal Co., Inc. and Mundet Cork Corp.

Howard Waldrop, Texarkana, Tex., for Keene Corp.

Richard L. Josephson, Larry D. Carlson, Houston, Tex., for Ownes-Illinois.

George A. Weller, William J. McCarthy, Beaumont, Tex., for Firbreboard.

Don W. Kent, Tyler, Tex., for Celotex.

Frank Finn, Jr., Dallas, Tex., for Johns-Manville Sales Corp.

Appeal from the United States District Court for the Eastern District of Texas.

Before GEE and JOHNSON, *Circuit Judges*, and VAN PELT*, *District Judge*.

GEE, *Circuit Judge*:

This appeal arises out of a diversity action brought by various plaintiffs—insulators, pipefitters, carpenters, and other factory workers—against various manufactur**[336]**ers, sellers, and distributors of asbestos-containing products. The plaintiffs, alleging exposure to the products and consequent disease, assert various causes of action, including negligence, breach of implied warranty, and strict liability. The pleadings in each of the cases are substantially the same. No plaintiff names a particular defendant on a case-by-case basis but, instead, includes several—often as many as twenty asbestos manufacturers—in his individual complaint. The rationale offered for this unusual pleading practice is that, given the long latent period of the diseases in question, it is impossible for plaintiffs to isolate the precise exposure period or to identify the particular manufacturer's product responsible. The trial court accepted this rationale and opted for a theory of enterprise- or industry-wide liability used in, for example, *Sindell v. Abott Laboratories*, 26 Cal.3d 588, 163 Cal.Rptr. 132, 607 P.2d 924 (1980), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980) (on

* District Judge of the District of Nebraska, sitting by designation.

proof that plaintiffs contracted a DES-related cancer and that their mothers took DES during pregnancy, market share apportionment determines a manufacturer's liability unless a given manufacturer exculpates itself by proving that its product could not have caused the injury). The trial court held that Texas courts, faced with the impossibility of identifying a precise causative agent in these asbestos cases, would adopt a form of *Sindell* liability, described as a "hybrid, drawing from concepts of alternative and/or concurrent liability and the law of products liability to form a type of absolute liability." The trial court ruled that "discovery on percentage share of a relevant market may lead to admissible evidence in the trials of some, and perhaps all, of these cases" and therefore granted leave to consolidate them for discovery purposes. This ruling is not on appeal here.

Defendants' interlocutory appeal under 28 U.S.C. § 1292(b) is directed instead at the district court's amended omnibus order dated March 13, 1981, which applies collateral estoppel to this mass tort. 509 F.Supp. 1353. The omnibus order is, in effect, a partial summary judgment for plaintiffs based on nonmutual offensive collateral estoppel and judicial notice derived from this court's opinion in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974) (henceforth *Borel*). *Borel* was a diversity lawsuit in which manufacturers of insulation products containing asbestos were held strictly liable to an insulation worker who developed asbestosis and mesothelioma and ultimately died. The trial court construed *Borel* as establishing as a matter of law/or fact that: (1) insulation products containing asbestos as a generic ingredient are "unavoidably unsafe products," (2) asbestos is a competent producing cause of mesothelioma and asbestosis, (3) no warnings were issued by any asbestos insulation manufacturers prior to 1964, and (4) the "warning standard" was not met by the *Borel* de-

fendants in the period from 1964 through 1969.[1] Insofar as the trial court based its omnibus order on the res judicata effect of *Borel*, this aspect of the order is no longer valid. *Migues v. Fibreboard Corp.*, 662 F.2d 1183 **[337]** (5th Cir. 1981). The sole issue on appeal is the validity of the order on grounds of collateral estoppel or judicial notice.

In *Flatt v. Johns-Manville Sales Corp.*, 488 F.Supp. 836 (E.D.Tex.1980), the same court outlined the elements of proof for plaintiffs in asbestos-related cases. There the court stated that the plaintiff must prove by a preponderance of the evidence that

1. Defendants manufactured, marketed, sold, distributed, or placed in the stream of commerce products containing asbestos.
2. Products containing asbestos are unreasonably dangerous.
3. Asbestos dust is a competent producing cause of mesothelioma.

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1 The omnibus order states in relevant part:

1. Relying upon the Court's opinions in *Flatt v. Johns-Manville Sales Corporation*, 488 F.Supp. 836 (E.D.Tex.1980) and a contemporaneously entered memorandum in the *Hardy* case, collateral estoppel in some form shall be entered in each of the foregoing cases. Issue preclusion may extend to the ultimate issue of marketing an unreasonably dangerous product or be limited to cluster issues depending upon the particular facts of the case.

2. In any event, no evidence shall be introduced on the issue of whether asbestos causes either asbestosis or mesothelioma.

3. Further, no evidence shall be introduced on the issue of knowledge as it may relate to a duty to warn due to the res judicata and/or collateral estoppel effect of *Borel v. Fibreboard Paper Products Corporation*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974). In essence, no evidence shall be admitted with respect to a state of the art defense.

Our summary of the court's conclusions is drawn both from the order and from the court's opinion at 509 F.Supp. 1353 (E.D.Tex.1981).

4. Decedent was exposed to defendant's products.
5. The exposure was sufficient to be a producing cause of mesothelioma.
6. Decedent contracted mesothelioma.
7. Plaintiffs suffered damages.

Id. at 838, *citing Restatement (Second) of Torts* § 402A(1) (1965). The parties agree that the effect of the trial court's collateral estoppel order in this case is to foreclose elements 2 and 3 above. Under the terms of the omnibus order, both parties are precluded from presenting evidence on the "state of the art"—evidence that, under Texas law of strict liability, is considered by a jury along with other evidence in order to determine whether as of a given time warning should have been given of the dangers associated with a product placed in the stream of commerce. Under the terms of the order, the plaintiffs need not prove that the defendants either knew or should have known of the dangerous propensities of their products and therefore should have warned consumers of these dangers, defendants being precluded from showing otherwise. On appeal, the defendants contend that the order violates their rights to due process and to trial by jury. Because we conclude that the trial court abused its discretion in applying collateral estoppel and judicial notice, we reverse.

CHOICE OF LAW

An initial question presented on appeal is what law governs the application of collateral estoppel in a diversity suit involving a prior federal judgment. Appellants argue that the trial court's choice of federal law was incorrect. According to appellants, these cases, couched in terms of Texas law of strict liability and negligence, should be governed by Texas rules of collateral estoppel. The choice of law question is supposedly of significance because, according to appellants, Texas strictly adheres to the doctrine of mutuality, *i.e.*, neither party can use a prior judgment to estop another unless both parties were bound by the prior judgment. If this view of Texas law is correct, the plain-

tiffs here, none of whom were parties to *Borel*, would of course be unable to invoke collateral estoppel.

We need not resolve the question of whether appellants' view of Texas law of collateral estoppel is correct, however, since the district court was bound under the law of our circuit to apply federal law. In *Johnson v. United States*, 576 F.2d 606, 613 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981), we stated that federal res judicata principles apply in federal tort claim actions in order to preserve the integrity of federal court judgments and that this rationale applies equally to diversity cases. *Accord*, *Southern Pacific Transportation Co. v. Smith Materials Corp.*, 616 F.2d 111, 115 (5th Cir. 1980); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716-17 (5th Cir.), *cert. denied*, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975). While appellants try valiantly to distinguish these cases, essentially on the grounds that these involved instances in which "the very issue involved in the first case was the subject of attempted litigation in the second," the distinction is one without significance. As the authors of the *Restatement (Second)—Judgments* conclude, the principle of finality essential to a court's authority demands that "federal law determine the effects under the rules of res judicata of a judgment of a federal court." **[338]** *Restatement (Second)—Judgments* § 87 (1982).[2]

Having determined that federal law of collateral estoppel governs, we next turn to an examination of just what that law is. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Supreme Court was asked to determine "whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party." *Id.* at 324, 99 S.Ct. at 648. The Court responded affirmatively, not-

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2 We acknowledge that not all circuits have followed what the authors of the Restatement regard as "the better reasoned" rule. *Restatement (2d)—Judgments* § 87, comment b. This circuit's adherence to the rule is, however, settled.

ing offensive collateral estoppel's "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Id.* at 326, 99 S.Ct. at 649. The Court reiterated that mutuality is not necessary to proper invocation of collateral estoppel under federal law, citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 799 (1971), and further held that the use of offensive collateral estoppel does not violate a defendant's seventh amendment right to a jury trial. To avoid problems with the use of the doctrine, the Court adopted a general rule of fairness, stating "that in cases where plaintiff could easily have joined in the earlier action or where . . . for other reasons, the application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." 439 U.S. at 331, 99 S.Ct. at 651. *See also Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1170-71 (5th Cir. 1981).

In the wake of *Parklane*, it is clear that a right, question, or fact[3] distinctly put in issue and directly determined as a ground of recovery by a court of competent jurisdiction collaterally estops a party or his privy from relitigating the issue in a subsequent action. So stated, the doctrine recognizes that a person "cannot be bound by a judgment unless he has had reasonable notice of the claim against him and opportunity to be heard in opposition to that claim. 1B J. Moore, *Moore's Federal Practice* ¶ 0.411 at 1252 (2d ed.1982) (henceforth *Moore's*). The right to a full and fair opportunity to litigate an issue is, of course, protected by the due process clause of the United States Constitution. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. at 329, 91 S.Ct. at 1444; *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). While *Parklane* made the doctrine of mutuality effectively a dead letter under federal law, the case left undisturbed the req-

3 It is well established that collateral estoppel embraces matters both of fact and of law. *See* 1B J. Moore, *Moore's Federal Practice* ¶ 0.442, at 3851 (2d ed. 1982).

uisite of privity, *i.e.*, that collateral estoppel can only be applied against parties who have had a prior " 'full and fair' opportunity to litigate their claims." 439 U.S. at 332, 99 S.Ct. at 652. The requirement that a person against whom the conclusive effect of a judgment is invoked must be a party or a privy to the prior judgment retains its full vigor after *Parklane* and has been repeatedly affirmed by our court. *See, e.g., Marcus v. St. Paul Fire & Marine Insurance Co.*, 651 F.2d 379, 382 n.3 (5th Cir. 1981); *In re Merrill*, 594 F.2d 1064, 1067 n.3 (5th Cir. 1979); *Johnson v. United States*, 576 F.2d at 615. *See also Restatement (Second) of Judgments* § 34 (1982).

THE NON-*BOREL* DEFENDANTS

This is the first and, in our view, insurmountable problem with the trial court's application of collateral estoppel in the case *sub judice*. The omnibus order under review here does not distinguish between defendants who were parties to *Borel* and those who were not; it purports to estop all defendants because all purportedly **[339]** share an "identity of interests" sufficient to constitute privity.[4] The trial court's action stretches "privity" beyond meaningful limits. While we acknowledge the manipulability of the notion of "privity," *see, e.g., Collateral Estoppel of Nonparties*, 87 Harv.L.Rev. 1485, 1490, 1494-95 & n.66 (1974), this has not prevented courts from establishing guidelines on the permissibility of binding nonparties through res judicata or collateral estoppel. Without such guidelines, the due process guarantee of a full and fair opportunity to litigate

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4 The following defendants were not parties to *Borel*: Owens Corning Fiberglass, 48 Insulation, Garlock, Crown Cork & Seal, Moodette, GREFCO, Keene, Owens Illinois, Raybestos-Manhattan, Standard Asbestos Mfg. & Insulating, UNARCO Industries, Nicolette, and Celotex. Six of the present appellants were parties to *Borel*: Pittsburgh Corning, Armstrong Cork, Phillip Carey, Ruberoid, Johns-Manville, and Fibreboard Paper. Owens Corning Fiberglass, Standard Asbestos Mfg. & Insulating, UNARCO, and Eagle-Picher Industries settled before trial. The trial court in *Borel* instructed a verdict in favor of Combustion Engineering because the plaintiff had failed to show that he had ever been exposed to any products of that company.

disappears. Thus, we noted in *Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84, 95 (5th Cir. 1977):

> Federal courts have deemed several types of relationships "sufficiently close" to justify preclusion. First, a nonparty who has succeeded to a party's interest in property is bound by any prior judgments against that party. . . . Second, a nonparty who controlled the original suit will be bound by the resulting judgment. . . . Third, federal courts will bind a nonparty whose interests were represented adequately by a party in the original suit.

(citations omitted). The rationale for these exceptions—all derived from *Restatement (Second) of Judgments* §§ 30, 31, 34, 39-41 (1982)—is obviously that in these instances the nonparty has in effect had his day in court. In this case, the exceptions elaborated in *Southwest Airlines* and in the *Restatement* are inapplicable. First, the *Borel* litigation did not involve any property interests. Second, none of the non-*Boral* defendants have succeeded to any property interest held by the *Borel* defendants. Finally, the plaintiffs did not show that any non-*Borel* defendant had any control whatever over the *Borel* litigation. "To have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action. He must also have control over the opportunity to obtain review." *Restatement (Second) of Judgments* § 39, comment c (1982). *Accord e.g.*, *Moore's* ¶ 0.411[6] at 1564-67. In, for example, *Sea-Land Services v. Gaudet*, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), the Supreme Court held that a nonparty may be collaterally estopped from relitigating issues necessarily decided in a suit by a party who acted as a fiduciary responsible for the beneficial interests of the nonparties. Even in this context, however, the Court placed the exception within strict confines: "In such cases, 'the beneficiaries are bound by the judgment with respect to the interest which was the subject of the fiduciary relationship . . . .' " *Id.* at 593-94, 94 S.Ct. at 819, *quoting* F. James, *Civil Procedure* § 11.28 at 592 (1965). Many of our circuit's cases evince a similar concern with keeping the nonparties' ex-

ceptions to res judicata and collateral estoppel within strict confines. *See, e.g., Southwest Airlines Co. v. Texas International Airlines, supra.*

The fact that all the non-*Borel* defendants, like the *Borel* defendants, are engaged in the manufacture of asbestos-containing products does not evince privity among the parties. The plaintiffs did not demonstrate that any of the non-*Borel* defendants participated in any capacity in the *Borel* litigation—whether directly or even through a trade representative—or were even part of a trustee-beneficiary relationship with any *Borel* defendant.[5] On the contrary, several of the defendants indicate on appeal that they were not even aware of the *Borel* **[340]** litigation until those proceedings were over and that they were not even members of industry or trade associations composed of asbestos product manufacturers.[6]

Plaintiffs can draw little support from the doctrine of "virtual representation" of cases such as *Aerojet-General Corp. v. Askey, supra*, in which we stated that "[u]nder the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative" and that "the question whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court." 511 F.2d at 719. In that case we approved a district court's determination that the interests of two government entities were so closely aligned that a prior judgment against one entity bound the other. The proposition that governments may represent private interests in litigation, thereby precluding relitigation, while uncertain at the margin, appears to be an unexceptional special instance of the examples noted

5 Indeed, the plaintiffs were compelled to prove little, since the trial court entered its omnibus order on its own motion without any evidentiary hearing.

6 Since *Borel* was neither designated nor approved as a class action, there can be no claim that any non-*Borel* defendant is bound as representative of a class.

in Restatement (Second) of Judgments § 41(1) (1982).[7] The facts here permit no inference of virtual representation of interest. As we explained in *Pollard v. Cockrell*, 578 F.2d 1002, 1008-9 (5th Cir. 1978):

> Virtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are accountable to nonparties who file a subsequent suit raising identical issues. . . . In the instant case . . . the [first] plaintiffs were in no sense legally accountable to the [second] plaintiffs; they shared only an abstract interest in enjoining enforcement of the ordinance. The [first] plaintiffs sued in their individual capacities and not as representatives of a judicially certified class. Representation by the same attorneys cannot furnish the requisite alignment of interest . . . .

Thus, in *Pollard* we rejected the contention that one group of massage parlor owners were bound by a judgment in a prior lawsuit brought by another group. Virtual representation was

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7 § 41. Person Represented by a Party

(1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is:

(a) The trustee of an estate or interest of which the person is a beneficiary; or

(b) Invested by the person with authority to represent him in an action; or

(c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary; or

(d) An official or agency invested by law with authority to represent the person's interests; or

(e) The representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member.

(2) A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process.

rejected despite nearly identical pleadings filed by the groups and representation by common attorneys. The court's omnibus order here amounts to collateral estoppel based on similar legal positions—a proposition that has been properly rejected by at least one other district court that considered the identical issue. *Mooney v. Fibreboard Corp.*, 485 F.Supp. 242, 249 (E.D. Tex.1980). We agree with the Texas Supreme Court that "privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts," *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 316, 363 (Tex.1971), and hold that the trial court's actions here transgress the bounds of due process.

Our conclusion likewise pertains to those defendants who, while originally parties to the *Borel* litigation, settled before trial. *See supra* note 4. The plaintiffs here did not show that any of these defendants settled out of the *Borel* litigation after the **[341]** entire trial had run its course and only the judicial act of signing a final known adverse judgment remained. Such action would suggest settlement precisely to avoid offensive collateral estoppel and, in an appropriate case, might preclude relitigation. All the indications here are, however, that the defendants in question settled out of the case early because of, for example, lack of product identification. Like the non-*Borel* defendants, these defendants have likewise been deprived of their day in court by the trial court's omnibus order.

THE *BOREL* DEFENDANTS

The propriety of estopping the six defendants in this case who were parties to *Borel* poses more difficult questions. In ascertaining the precise preclusive effect of a prior judgment on a particular issue, we have often referred to the requirements set out, *inter alia*, in *International Association of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 132 (5th Cir. 1975), and cases cited therein. The party asserting the estoppel must show that: (1) the issue to be concluded is identical to that involved in the prior action; (2) in the prior action the issue was "actually litigated"; and (3) the determination made of the is-

sue in the prior action must have been necessary and essential to the resulting judgment.

> If it appears that a judgment may have been based on more than one of several distinctive matters in litigation and there is no indication which issue it was based on or which issue was fully litigated, such judgment will not preclude, under the doctrine of collateral estoppel, relitigation of any of the issues.

Federal Procedure, Lawyers Ed. § 51.218 at 151 (1981) (citations omitted). *See also, e.g., Moore's* ¶ 0.442; *Restatement (Second)—Judgments* § 29, comment a (1982).

Appellants argue that *Borel* did not necessarily decide that asbestos-containing insulation products were unreasonably dangerous because of failure to warn. According to appellants, the general *Borel* verdict based on general instructions and special interrogatories, permitted the jury to ground strict liability on the bases of failures to test, of unsafeness for intended use, of failure to inspect, or of unsafeness of the product. Strict liability on the basis of failure to warn, although argued to the jury by trial counsel for the plaintiff in *Borel*, was, in the view of the appellants, never formally presented in the jury instructions and therefore was not essential to the *Borel* jury verdict.

Appellants' view has some plausibility. The special interrogatories answered by the *Borel* jury were general and not specifically directed to failure to warn.[8] Indeed, as we discussed at

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8 SPECIAL INTERROGATORY NO. 1: Do you find from a preponderance of the evidence that any of the Defendants listed below was negligent in any of the respects contended by Plaintiff, which negligence was a proximate cause of the injuries and death of the deceased? Answer "Yes" or "No" opposite the named defendant. [The jury answered "No" as to Pittsburgh and Armstrong and "Yes" as to the other four defendants.]

SPECIAL INTERROGATORY NO. 2: [This interrogatory submitted the question whether any of the six defendants were guilty of an act or acts of gross negligence, and the jury found that no defendant was guilty of gross negligence.]

SPECIAL INTERROGATORY NO. 3: Do you find from a preponderance of the evidence that the deceased was guilty of contributory negligence and that

length in our review of the *Borel* judgment, the jury was instructed in terms of "breach of warranty." 493 F.2d at 1091. Although the jury was accurately instructed as to "strict liability in tort" as defined in section 402A of the *Restatement* **[342]** *(Second) of Torts*, that phrase was never specifically mentioned in the jury's interrogatories. It is also true that the general instructions to the *Borel* jury on the plaintiff's causes of action did not charge on failure to warn, except in connection with negligence.[9] Yet appellants' argument in its broadest form must ultimately fail. We concluded in *Borel*:

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such negligence was a proximate cause of the injuries and death of the deceased? [The jury answered "Yes."]

SPECIAL INTERROGATORY NO. 4: Do you find from a preponderance of the evidence that the warranties as contended for by the Plaintiff were violated by any of the Defendants listed below, which breach of warranty was a proximate cause of the injuries and death of the deceased? [The jury answered "Yes" as to each defendant.]

SPECIAL INTERROGATORY NO. 5: What amount of money, if paid now in cash, would fairly and reasonably compensate the Plaintiff, Freida Borel, for the damages she sustained by virtue of the death of her husband? ANSWER: Actual damages $68,000. Damages for gross negligence "None."

9 The jury was instructed, *inter alia*, as follows:

> Mrs. Borel, as the plaintiff, alleges that the defendants, each and all of them, were guilty of negligence, which negligence was the proximate cause. Now, the plaintiff contends that the defendants knew or in the exercise of ordinary or reasonable care ought to have known that the insulation they so prepared and manufactured and distributed were deleterious, poisonous and highly harmful to the deceased's body, lungs, respiratory system, skin and health, and that therefore the defendants were negligent in failing to take any reasonable precaution or exercise reasonable care to warn the deceased of the danger and the harm to which he was exposed while handling the defendants' asbestos product as an insulator.
>
> Further, they allege that the defendants were negligent in failing and omitting to provide the deceased with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances or method of handling or using said products so as to protect the deceased from being disabled and resulting in his death.

The jury found that the unreasonably dangerous condition of the defendants' product was the proximate cause of

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Further, they contend that the defendants should have tested their products, especially those containing asbestos, to ascertain the safe or dangerous nature of such products before offering them for sale, that the defendants should have removed such product from the market upon ascertaining that such products would cause asbestosis. Now those are the specific acts of negligence contended for by the plaintiff.

Now, in this connection it is necessary for the Court to give you certain instructions in regard to the warning. As you know, one of the acts of negligence contended for by the plaintiff and perhaps the principle act of negligence is that the manufacturer should have given a warning or a proper warning to the use of its product. The Court would instruct you that a manufacturer of goods has a duty to give reasonable warning as to the dangers inherent or reasonably foreseeable in using his product. The defendants are under an obligation and duty to give reasonable warning as to the danger of their products, even if the product or products is not being used in a specific manner, so long as the use to which the product was put was a use that the manufacturer could reasonably foresee.

Also in connection with the manner of warning, the Court would instruct you that the defendants are under no duty to warn of any danger in the use of their products unless and until the state of the medical and technical knowledge was such that a reasonabl[y] prudent manufacturer would have been aware of the danger and the necessity of giving warning.

Further, the defendant cannot be held responsible for failure to give warnings unless it is first established by a preponderance of the evidence that the state of the medical and technical knowledge was such that the defendants, manufacturers of the products, involved knew or in the ordinary exercise of care should have known that the manner in which their products was being handled, used and installed by insulator workers rendered them unreasonably dangerous to the user or consumer or those engaged in the installing of the product.

Now, keeping these specific acts of negligence in mind, the Court would instruct you that if you find from a preponderance of the evidence that the defendants or any one of them was guilty of any one act or omission of negligence contended for by the plaintiff and that such act of negligence was a proximate cause of the injuries and death of Mr. Borel, then you would find for the plaintiff, unless you should find for the defendant or defendants under some further instruction of the Court. The Court would further instruct you that you need not

> Borel's injury. This necessarily included a finding that, had adequate warnings been provided, Borel would have chosen to avoid the danger.

493 F.2d at 1093. As the appellants at times concede in their briefs, "if *Borel* stands for any rule at all, it is that defendants have a duty to warn the users of their products of the long-term dangers attendant upon its use, including the danger of an occupational disease." Indeed, the first sentence in our *Borel* opinion states that that case involved "the scope of an asbestos manufacturer's duty to warn industrial in**[343]**sulation workers of dangers associated with the use of asbestos." *Id.* at 1081. *See also* 493 F.2d at 1105 (on rehearing). Our conclusion in *Borel* was grounded in that trial court's jury instructions concerning proximate cause and defective product, which we again set forth in the margin.[10] Close reading of these instructions con-

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> find that all of the acts or omissions of negligence as contended for by the plaintiff exist. You only have to find that some one act or omission of negligence existed from a preponderance of the evidence and which single act or omission of negligence was the proximate cause. . . .

10 The *Borel* trial court had stated in part:

> Now turning our attention to the matter of the defenses of the defendants in connection with the implied warranty or strict liability, you are charged that if there is any unreasonable risk or danger from using defendants' products containing asbestos, which risk or danger must be *the risk or danger beyond that which would be contemplated by insulation contractor or insulator with the knowledge available to them as to characteristics of the product, such unreasonable risk or danger from using defendants' product must have been reasonably foreseen by the manufacturer*. Therefore, if you find from a preponderance of the evidence that Mr. Borel came in contact with the defendants' product and developed asbestosis thereafter and at such time of contact, the product containing asbestos manufactured by the defendant and that the danger of the use of the said asbestos products by Mr. Borel could not have been reasonably foreseen by the manufacturer, then there could be no proximate cause and your verdict would be for the defendants. In other words, there would be no proximate cause of the breach of the warranty or strict liability that would justify your finding in favor of the plaintiff, but you would have to find for the defen-

vinced our panel in *Borel* that failure to warn was necessarily implicit in the jury's verdict. While the parties invite us to reconsider our holding in *Borel* that a failure to warn grounded the jury's strict liability finding in that case, we cannot, even if we were so inclined, displace a prior decision of this court absent reconsideration en banc. Further, there is authority for the proposition that once an appellate court has disposed of a case on the basis of one of several alternative issues that may have grounded a trial court's judgment, the issue decided on appeal is conclusively established for purposes of issue preclusion. *See Moore's* ¶ 0.416[2] at 2231, ¶ 443[5] at 3921 n.10; *IRO v. Republic SS Corp.*, 189 F.2d 858, 862 (4th Cir. 1951). Nonetheless, we must ultimately conclude that the judgment in *Borel* cannot estop even the *Borel* defendants in this case for three interrelated reasons.

First, after review of the issues decided in *Borel*, we conclude that *Borel*, while conclusive as to the general matter of a duty to warn on the part of manufacturers of asbestos-

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dants. Also, in connection with the implied warranty theory, you are instructed that the burden of proof is on the plaintiff in this case. Before they are entitled to recover any damages against any of the defendants to establish by a preponderance of the evidence that the product sold by the particular defendant or defendants was defective at the time it was sold. Before a product can be found to be defective it must establish that it was unreasonably dangerous to the user o[r] consumer at the time it was sold. *You are further instructed that the burden of proof is on the plaintiff to establish also by a preponderance of the evidence not only that the product was defective but also that the defect in the product was a proximate cause of the death of Clarence Borel.*

By the term DEFECTIVE *as used in this charge is meant a condition not contemplated by the insulator, contractor or ultimate user.* Accordingly, you are instructed that in the event plaintiff has failed to prove by a preponderance of the evidence the existence of a defect in the product at which time the product was sold and that such defect was the proximate cause of the death of Clarence Borel, then you cannot find for the plaintiff on the theory of breach of implied warranty or strict liability and you must return a verdict against the plaintiff and in favor of the defendants.

493 F.2d at 1090 n.26 (emphasis added).

containing insulation products, is ultimately ambiguous as to certain key issues. As the authors of the *Restatement (Second)—Judgments* § 29, comment g (1982), have noted, collateral estoppel is inappropriate where the prior judgment is ambivalent:

> The circumstances attending the determination of an issue in the first action may indicate that it could reasonably have been resolved otherwise if those circumstances were absent. Resolution of the issue in question may have entailed reference to such matters as the intention, knowledge, or comparative responsibility of the parties in relation to each other. . . . In these and similar situations, taking the prior determination at face value for purposes of the second action would extend the effects of imperfections in the adjudicative process beyond the **[344]** limits of the first adjudication, within which they are accepted only because of the practical necessity of achieving finality.

The *Borel* jury decided that Borel, an industrial insulation worker who was exposed to fibers from his employer's insulation products over a 33-year period (from 1936 to 1969), was entitled to have been given fair warning that asbestos dust may lead to asbestosis, mesothelioma, and other cancers. The jury dismissed the argument that the danger was obvious and regarded as conclusive the fact that Borel testified that he did not know that inhaling asbestos dust could cause serious injuries until his doctor so advised him in 1969. The jury necessarily found "that, had adequate warnings been provided, Borel would have chosen to avoid the danger." 493 F.2d at 1093. In *Borel*, the evidence was that the industry as a whole issued no warnings at all concerning its insulation products prior to 1964, that Johns-Manville placed a warnings label on packages of its products in 1964, and that Fibreboard and Rubberoid placed warnings on their products in 1966. *Id.* at 1104.

Given these facts, it is impossible to determine what the *Borel* jury decided about *when* a duty to warn attached. Did the jury find the defendants liable because their warnings after 1966,

when they acknowledged that they knew the dangers of asbestosis, were insufficiently explicit as to the grave risks involved? If so, as appellants here point out, the jury may have accepted the state of the art arguments provided by the defendants in *Borel—i.e.*, that the defendants were not aware of the danger of asbestosis until the 1960's. Even under this view, there is a second ambiguity: was strict liability grounded on the fact that the warnings issued, while otherwise sufficient, never reached the insulator in the field? If so, perhaps the warnings, while insufficient as to insulation workers like Borel, were sufficient to alert workers further down the production line who may have seen the warnings—such as the carpenters and pipefitters in this case. Alternatively, even if the *Borel* jury decided that failure to warn before 1966 grounded strict liability, did the duty attach in the 1930's when the "hazard of asbestosis as a pneumoconiotic dust was universally accepted," *id.* at 1083, or in 1965, when documentary evidence was presented of the hazard of asbestos insulation products to the installers of these products?[11]

As we noted in *Borel*, strict liability because of failure to warn is based on a determination of the manufacturer's reasonable knowledge:

> [I]n cases such as the instant case, the manufacturer is held to the knowledge and skill of an expert. This is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product. . . . The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.

493 F.2d at 1089. Thus, the trial judge in *Borel* instructed the jury that the danger "must have been reasonably foreseen by the manufacturer." *Id.* at 1090. As both this instruction and the

11 Selikoff, Chirg & Hammond, *The Occurrence of Asbestosis Among Industrial Insulation Workers*, 132 Ann.N.Y.Acad. of Sci. 139 (1965), and discussed at *Borel*, 493 F.2d at 1085.

ambiguities in the *Borel* verdict demonstrate, a determination that a particular product is so unreasonably hazardous as to require a warning of its dangers is not an absolute. Such a determination is necessarily relative to the scientific knowledge generally known or available to the manufacturer at the time the product in question was sold or otherwise placed in the stream of commerce.[12]

Not all the plaintiffs in this case were exposed to asbestos-containing insula**[345]**tion products over the same 30-year period as plaintiff Borel. Not all plaintiffs here are insulation workers isolated from the warnings issued by some of the defendants in 1964 and 1966. Some of the products may be different from those involved in *Borel*. Our opinion in *Borel*, "limited to determining whether there [was] a conflict in substantial evidence sufficient to create a jury question," did not resolve that as a matter of fact all manufacturers of asbestos-containing insulation products had a duty to warn as of 1936, and all failed to warn adequately after 1964. Although we determined that the jury must have found a violation of the manufacturers' duty to warn, we held only that the jury could have grounded strict liability on the absence of a warning prior to 1964 or "could have concluded that the [post-1964 and post-1966] 'cautions' were not warnings in the sense that they adequately communicated to Borel and other insulation workers knowledge of the dangers to which they were exposed so as to give them a choice of working or not working with a dangerous product." 493 F.2d at 1104. As we have already had occasion to point out in *Migues v. Fibreboard Corp.*, 662 F.2d at 1188-89, our opinion in *Borel* merely approved of the various ways the jury could have come to a conclusion concerning strict liability for failure to warn. We did not say that any of the specific alternatives that the jury had before it were necessary or essential to its verdict.

> The *only* determination made by this court in *Borel* was that, based upon the evidence in that case, the jury's find-

12 *See, e.g., Crocker v. Winthrop Laboratories*, 514 S.W.2d 429 (Tex.1974).

> ings could not be said to be incorrect as a matter of law. But this Court certainly did not decide that every jury presented with the same facts would be compelled to reach the conclusion reached by the *Borel* jury: that asbestos was unreasonably dangerous. Such a holding would have been not only unnecessary, it would also have been unwarranted.
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> In *Borel*, this Court said: "the jury was *entitled* to find that the danger to Borel and other insulation workers from inhaling asbestos dust was foreseeable to the defendants at the time the products causing Borel's injuries were sold," 493 F.2d at 1093 (emphasis added). . . . This Court did not say that, as a matter of law, the danger of asbestos inhalation was so hidden from every asbestos worker in every situation as to create a duty to warn on the part of all asbestos manufacturers. On rehearing, this Court held that although some asbestos products used by plaintiff Borel contained warnings, there was sufficient evidence that the warnings were inadequate to inform workers of the actual dangers posed by asbestos inhalation to justify submission of that issue to the jury. 493 F.2d at 1105. This Court did not state that every jury would be required, as a matter of law, to find such warnings inadequate.
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> In sum, this Court held in *Borel* only that the *Borel* jury, on the evidence presented to it, could have found that asbestos products unaccompanied by adequate warnings were unreasonably dangerous. The proposition that all juries presented with similar evidence regarding asbestos products would be compelled to find those products unreasonably dangerous was not presented in *Borel*, and therefore, this Court did not reach it. Since *stare decisis* is accorded only those issues necessarily decided by a court in reaching its result, the District Court erred in overreading the holding of our opinion in *Borel*.

Id. (emphasis in original). Like *stare decisis*, collateral estoppel applies only to issues of fact or law necessarily decided by a prior court. Since we cannot say that *Borel* necessarily decided, as a matter of fact, that all manufacturers of asbestos-

containing insulation products knew or should have known of the dangers of their particular products at all relevant times, we cannot justify the trial court's collaterally estopping the defendants from presenting evidence as to the state of the art.

Even if we are wrong as to the ambiguities of the *Borel* judgment, there is a second, equally important, reason to deny collateral estoppel effect to it: the presence **[346]** of inconsistent verdicts. In *Parklane Hosiery v. Shore*, 439 U.S. at 330-31, 99 S.Ct. at 651, the Court noted that collateral estoppel is improper and "unfair" to a defendant "if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Id.* at 330, 99 S.Ct. at 651. *Accord Restatement (Second)—Judgments* § 29(4) (1982).[13] Not only does issue preclusion in such cases appear arbitrary to a defendant who has had favorable judgments on the same issue, it also undermines the premise that different juries reach equally valid verdicts. *See Restatement (Second)—Judgments* § 29, comment f (1982). One jury's determination should not, merely because it comes later in time, bind another jury's determination of an issue over which there are equally reasonable resolutions of doubt.

The trial court was aware of the problem and referred to *Flatt v. Johns-Manville Sales Corp.*, 488 F.Supp. at 841, a prior opinion by the same court. In *Flatt* the court admitted that Johns-Manville had "successfully defended several asbestos lawsuits in the recent past" but stated that "lawsuits in which Johns-Manville has prevailed have been decided on the basis that there was insufficient exposure to asbestos dust, or alternatively, the plaintiff, or decedent, did not contract asbestosis or mesothelioma." *Id.* Given the information made available to us

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13 The injustice of applying collateral estoppel in cases involving mass torts is especially obvious. Thus, in *Parklane* the Court cited Prof. Currie's "familiar example": "A railroad collision injures 50 passengers all of whom bring separate actions against the railroad. Ater the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover." 439 U.S. at 331 n.14, 99 S.Ct. at 651 n.14, *citing* Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 Stan.L.Rev. 281, 304 (1957).

in this appeal, we must conclude that the trial court in *Flatt* and in the proceeding below was inadequately informed about the nature of former asbestos litigation. On appeal, the parties inform us that there have been approximately 70 similar asbestos cases thus far tried around the country. Approximately half of these seem to have been decided in favor of the defendants.[14] A court able to say that the approximately 35 suits decided in favor of asbestos manufacturers were all decided on the basis of insufficient exposure on the part of the plaintiff or failure to demonstrate an asbestos-related disease would be clairvoyant. Indeed, the appellants inform us of several products liability cases in which the state of the art question was fully litigated, yet the asbestos manufacturers were found not liable. Although it is usually not possible to say with certainty what these juries based their verdicts on, in at least some of the cases the verdict for the defendant was not based on failure to prove exposure or failure to show an asbestos-related disease. In *Starnes v. Johns-Manville Corp.*, No. 2075-122 (E.D.Tenn.1977), one of the cases cited in *Flatt v. Johns-Manville Sales Corp.*, *supra*, the court's charge to the jury stated that it was "undisputed that as a result of inhaling materials containing asbestos, Mr. Starnes contracted the disease known as asbestosis." The verdict for the defendant in *Starnes* must mean, inter alia, that the jury found the insulation products involved in that case not unreasonably dangerous. This court takes judicial notice of these inconsistent or ambiguous verdicts pursuant to Fed.R.Evid. 201(d). We conclude that the court erred in arbitrarily choosing one of these verdicts, that in *Borel*, as the bellwether.

Finally, we conclude that even if the *Borel* verdict had been unambiguous and the sole verdict issued on point, application of collateral estoppel would still be unfair with regard to the *Borel* defendants because it is very doubtful that these defendants could have foreseen that their $68,000 liability to plaintiff Borel would foreshadow multimillion dollar asbestos liability. As noted in *Parklane*, it would be unfair to apply collat**[347]**-

14 The parties also inform us that there are at least seven judgments in favor of several of the defendants in this case alone.

eral estoppel "if a defendant in the first action is sued for small or nominal damages [since] he may have little incentive to defend vigorously, particularly if future lawsuits are not foreseeable." 439 U.S. at 330, 99 S.Ct. at 651. While in absolute terms a judgment for $68,000 hardly appears nominal, the Supreme Court's citation of *Berner v. British Commonwealth Pacific Airlines*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983, 86 S.Ct. 559, 15 L.Ed.2d 472 (1966) (application of collateral estoppel denied where defendant did not appeal an adverse judgment awarding damages of $35,000 and defendant was later sued for over $7 million), suggests that the matter is relative. The reason the district court here applied collateral estoppel is precisely because early cases like *Borel* have opened the floodgates to an enormous, unprecedented volume of asbestos litigation. According to a recent estimate, there are over 3,000 asbestos plaintiffs in the Eastern District of Texas alone and between 7,500 and 10,000 asbestos cases pending in United States District Courts around the country. The omnibus order here involves 58 pending cases, and the many plaintiffs involved in this case are *each* seeking $2.5 million in damages. Such a staggering potential liability could not have been foreseen by the *Borel* defendants. *See McCarty v. Johns-Manville Sales Corp.*, 502 F.Supp. 335, 339 (S.D.Miss.1980).

The trial court's application of issue preclusion to the "fact" that asbestos is in all cases a competent producing cause of mesothelioma and asbestosis involves similar problems. *Borel* dealt with the disease-causing aspects of asbestos dust generated by insulation materials. That case did not determine as a matter of fact that because airborne asbestos dust and fibers from thermal insulation materials are hazardous, all products containing asbestos—in whatever quantity or however encapsulated—are hazardous. The injustice in precluding the "fact" that the generic ingredient asbestos invariably and in every use or mode causes cancer is clearest in the case of appellant Garlock. Garlock points out that its products, unlike the loosely woven thermal insulation materials in *Borel* that, when merely handled, emitted large quantities of airborne asbestos dust and fibers, are linoleum-type products in which the asbestos is

encapsulated in a rubber-like coating. According to Garlock, its gasket products do not release significant amounts of dust or fibers into the air and have never been demonstrated to be dangerous in installation, use, or removal. Certainly, defendants ought to be free, even after *Borel*, to present evidence of the scientific knowledge *associated with their particular product* without being prejudiced by a conclusive presumption that asbestos in all forms causes cancer. The court regarded collateral estoppel in this context as precluding merely the "can it" question rather than the "did it" question. 509 F.Supp. at 1362. The problem is that the "can it" and "did it" questions cannot in this instance be so easily segregated, and a determination that asbestos generally is hazardous threatens to undermine a defendant's possibly legitimate defense that its product was not scientifically known to be hazardous, now or at relevant times in the past. If the trial court's application of issue preclusion on the generic danger of asbestos is not meant to burden a defendant's ability to present such evidence, then we fail to see the intended usefulness of the court's action.

For much the same reasons, the court's alternative justification for this aspect of its omnibus order—relying upon judicial notice of adjudicative fact under Fed.R.Evid. 201(b)(2) and (c)—is likewise improper. As the court itself concedes, Rule 201 relates to medical facts not subject to reasonable dispute. In *Franklin Life Insurance co. v. William J. Champion & Co.*, 350 F.2d 115, 130 (6th Cir. 1965), *cert. denied*, 384 U.S. 928, 86 S.Ct. 1445, 16 L.Ed.2d 531 (1966), the court took judicial notice of the fact that cancer does not manifest itself quickly but lies dormant, typically for long periods. As in *Franklin*, judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities. The proposition that asbestos causes cancer, because it is inextricably linked to a host of disputed **[348]** issues—*e.g.*, can mesothelioma arise without exposure to asbestos, is the sale of asbestos insulation products definitely linked to carcinoma in the general population, was this manufacturer reasonably unaware of the asbestos hazards in 1964—is not at present so self-evident a proposition as to be subject to judicial notice. The

rule of judicial notice "contemplates there is to be no evidence before the jury in disproof." Fed.R.Evid. 201, Adv.Comm. Note g (1975). Surely where there is evidence on both sides of an issue the matter is subject to reasonable dispute. Judicial notice was therefore inappropriate here.

Like the court in *Migues*, we too sympathize with the district court's efforts to streamline the enormous asbestos caseload it faces. None of what we say here is meant to cast doubt on any possible alternative ways to avoid reinventing the asbestos liability wheel.[15] We reiterate the *Migues* court's invitation to district courts to attempt innovative methods for trying these cases. We hold today only that courts cannot read *Borel* to stand for the proposition that, as matters of fact, asbestos products are unreasonably dangerous or that asbestos as a generic element is in all products a competent producing cause of cancer. To do otherwise would be to elevate judicial expedience over considerations of justice and fair play.

REVERSED.

Appendix

To: THE STUDY COMMITTEE FOR THE EFFICIENT DISPOSITION OF ASBESTOS-RELATED CASES

From: ROBERT M. PARKER, U. S. DISTRICT JUDGE

Date: JANUARY 22, 1982

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15 As an indication of some of the many possible innovative ideas in this area, we attach to this opinion a copy of a memorandum from Judge Robert M. Parker to the Study Committee for the Efficient Disposition of Asbestos-Related Cases dated January 22, 1982. Other possibilities arise from selective adaptation of some of the procedures in the Manual for Complex Litigation. Joint discovery and consolidation of appropriate groups of cases for trial of particular common issues are some of the possibilities. We are not here advocating or approving any particular measure but merely enumerating some out of the great range of innovative possibilities that may be explored without doing violence to established requirements and principles of collateral estoppel and judicial notice.

Subject: PROPOSED STANDARD PROCEDURES FOR HANDLING ASBESTOS CASES

(COMMITTEE MEMBERS: Plaintiff's Counsel: Walter Umphrey, Marlin Thompson, Scott Baldwin and Rex Houston. Defendants' Counsel: O. J. Weber, Gordon Pate, John Bissell, John Tucker, Jack Flock, John Ward, Carlisle DeHay, and Frank Finn)

Attached please find the proposed standard procedures for handling asbestos cases in the Eastern District in its rough form. I have incorporated, to the extent possible, your suggestions and have included additional procedures at the request of the Clerk's office which are calculated to solve what is amounting to a tremendous paper problem.

I would appreciate your reviewing the proposal and providing me with your observations and recommendations at an early date so that the Order may be implemented as quickly as possible.

In addition to the contents of the proposal there are some other matters on which I would appreciate your comments. The first is an effective way to deal with releases accompanying partial settlements that should be added to paragraph 23. Hopefully, some form of agreed standard order could be entered by the Court that would accomplish the effect of releasing any settling defendant upon payment without the necessity of the creation of additional instruments.

The next matter concerns suggestions for procedures whereby cases of plaintiffs without substantial present symptoms which are productive of disability could be dismissed as having been prematurely filed, preserving a cause of action for the plaintiff in the future in the event actual disability subse**[349]**quently develops and eliminating the statute of limitations problem for the particular plaintiff.

I understand Judge Steger is examining the process of preserving the plaintiff's cause of action, and I shall confer with him prior to our next discussion in order to secure his thoughts on the matter.

Also, the utilization of a settlement questionnaire has not been addressed in this proposal, however, I would like to see it implemented and would appreciate your suggestions.

Further, I would appreciate your comments regarding utilization of a standard or uniform pre-trial order to which individualized witness lists and exhibit lists could be filed for each particular case.

STANDARD PROCEDURE FOR ASBESTOS CASES IN THE EASTERN DISTRICT OF TEXAS

This order shall apply to all cases filed in the Eastern District of Texas that claim damages for injury, illness, or wrongful death as a result of exposure to products containing asbestos. In cases currently pending, the parties shall have sixty (60) days to comply with provisions of this order with which they are not already in compliance.

1. At the time suit is filed on behalf of a plaintiff claiming damages for an asbestos-related injury or disease, the plaintiff's attorney shall file with the Clerk's office, as an exhibit to the plaintiff's complaint, the following:

a. the names and addresses of all consulting, treating, or diagnosing physicians, together with the names and addresses of any physicians the plaintiff may have seen for any reason in the past ten (10) years, and authorization signed by the plaintiff allowing said physicians to release the medical records for examination and copying by the defendants; psychiatrists shall be excepted from this provision, unless the plaintiff is relying on psychiatric testimony to prove damages.

b. copies of any medical or hospital records relied on by the plaintiff to establish the existence of any asbestos-related disease or injury.

c. copies of the plaintiff's income tax records for the past five (5) years or, in lieu thereof, an authorization for income tax records for the past five (5) years executed in favor of each named defendant.

d. authorization in favor of each named defendant to secure social security records.

e. complete answers to the defendants' joint master set of interrogatories on file in the District Clerk's office, which answers shall be supplemented as new information is received up to and including time of trial.

f. the full style, docket number, and date of filing of any suit filed by the plaintiff in any jurisdiction, which contains the same or similar allegations against any of the same defendants.

2. The Clerk's office shall not accept for filing any asbestos suit that does not contain the above-described attachments unless the plaintiff's attorney certifies that the statute of limitations may be about to run, at which time the Clerk's office shall accept the suit and the plaintiff's attorney shall be permitted thirty (30) days to file such attachments.

3. The following companies frequently named as parties-defendant in asbestos-related suits shall designate a local agent for service of process in the Eastern District of Texas, who shall accept service of process by registered mail as substitute service.

a. Armstrong Cork Company
b. Atlas Asbestos
c. Celotex Corporation/Phillip Carey Manufacturing Company
d. Combustion Engineering
e. Crown Cork and Seal (Mundet)
f. Eagle-Picher Industries, Inc.
g. Empire Asbestos
h. Fibreboard Corporation
i. Forty-eight Insulations
j. GAF Corporation (Ruberoid Corporation)
[350]k. Garlock
l. Johns-Manville Sales Corporation
m. Keene Corporation
n. Nicolet Industries, Inc.

o. Owens-Corning Fibreglas
p. Owens-Illinois
q. Pittsburg-Corning
r. H. K. Porter Company, Inc. (Southern Asbestos)
s. Raybestos-Manhatten
t. Rock Wool Manufacturing Company
u. Standard Asbestos-Insulating and Manufacturing Company
v. (Turner & Newall, Ltd.)
w. UNARCO

4. All notices required under the Federal Rules of Civil Procedure to be sent by certified mail that pertain to discovery matters or medical examinations may be sent by regular mail.

5. The defendants in each case shall designate one liaison counsel to coordinate discovery and the filing of motions and responses to motions. It shall be the responsibility of the liaison counsel to avoid duplication in any of these pretrial matters, and to ensure that no party is unnecessarily inconvenienced by the scheduling of depositions. All other defense counsel shall confer with the liaison counsel before filing any motion or scheduling any deposition.

6. Thirty (30) days after the filing of the defendant's answer, the defendants shall answer completely the plaintiff's master set of interrogatories on file in the District Clerk's office, and shall supplement such answers with any new information as it is received, up to and including time of trial.

7. No additional interrogatories or requests for admission shall be submitted to any party except by order of the Court upon motion demonstrating extraordinary circumstances.

8. Motions to dismiss or transfer for improper venue or for forum nonconveniens and motions to dismiss for lack of diversity shall be filed no later than thirty (30) days after the defendants' answer is filed.

9. No further discovery may occur until all parties have complied with the above discovery requirements, except by order of the Court upon motion showing extraordinary circumstances.

10. Each defendant is deemed to be asserting a cross-action for indemnity or contribution against all other defendants; therefore, cross-claims should not be filed. In the event that any defendant is dismissed from the main action, all cross-actions deemed by this order to have been asserted by or against said defendant will be automatically dismissed; therefore, motions by such defendants for dismissal of cross-claims should not be filed. These provisions do not apply to third-party complaints that allege the breach of a direct responsibility to the third-party plaintiff; such complaints require formal filing and dismissal.

11. No additional parties may be joined after sixty (60) days from the filing of defendants' answer.

12. The following standard motions, in all cases in which they are applicable, will be considered for purposes of appeal to have been timely filed and responded to, and are disposed of as indicated. No such motions or responses need be or shall be filed.

a. The plaintiff's MOTION FOR PARTIAL SUMMARY JUDGMENT on grounds of collateral estoppel is DENIED.

b. The plaintiff's MOTION FOR LEAVE TO ASSERT CLAIM FOR PUNITIVE DAMAGES is GRANTED.

c. The parties' MOTIONS TO USE DEPOSITIONS TAKEN IN OTHER CASES is GRANTED, subject to specific objections at time of trial to the admissibility of specific parts. The parties shall designate to each other by page and line the parts of the depositions that they intend to use no later than five (5) days prior to trial.

d. All defendants' MOTIONS FOR SUMMARY JUDGMENT on grounds that the plaintiff was not exposed to their products are DENIED. The plaintiff's failure to nonsuit any particular **[351]** defendant at least seven (7) days before trial is a representation to the Court that the plaintiff will present competent evidence at trial that he was ex-

posed to the defendant's products. The failure of the plaintiff to present such evidence will subject the plaintiff to such sanctions as the Court in its discretion deems proper, including but not limited to costs and reasonable attorney's fees for the defendant in question.

In the event that the case is appealed, all of the above motions that any party desires to preserve for appeal must actually be filed in the clerk's office no later than twenty-five (25) days after the notice of appeal is filed.

13. When the interests of more than one party plaintiff or defendant are the same in regard to a particular motion, the motion shall be filed jointly by all parties having such common interests. Such parties shall designate a lead attorney to act as spokesman for the motion. This designation shall be coordinated through the liaison counsel for the respective parties. No party shall waive any rights by failing to attend a hearing on such motion, unless the attendance of the party has been ordered by the Court. The designation of any attorney to act as spokesman for a group of plaintiffs or defendants shall not preclude counsel for any party from participating to the extent necessary to represent the individual interests of his client, as long as said participation does not involve duplication.

14. To the extent practicable, all motions that apply to more than one case, for example a motion to quash a general deposition, shall be filed as a single motion listing all cases to which it applies in separate headings.

15. Attorneys handling asbestos cases in the Eastern District of Texas shall consult with each other concerning persons whom they desire to depose, and to the extent practicable they shall coordinate scheduling of depositions desired for more than one case so as to minimize inconvenience and expense to the deponents or any party of record as of the date of filing notice of the deposition.

16. Notices of depositions shall be served at least two (2) weeks prior to the date they are taken, except by agreement of all counsel, or by order of the Court upon motion showing extraordinary circumstances.

17. The Court hereby approves the proper utilization of multi-state depositions by all parties in order to prevent unnecessary expense and delay. General objections to the taking of multi-state depositions will be considered to have been timely and are hereby overruled. In the event of the taking of any expert witness's multi-state or out-of-state deposition, at least twenty-one (21) days' notice must be given.

18. No depositions, interrogatories, requests for admissions, or answers thereto shall be filed in the Clerk's office except by order of the Court, except for answers to the master sets of interrogatories. A party filing an objection to interrogatories or requests for admission shall attach a copy of said interrogatories or requests to its objection.

19. The Clerk's office will not mail copies of motions to counsel of record; counsel for the party filing the motion is responsible for sending a true and correct copy of the motion to all counsel of record, and must certify in an affidavit attached to the motion that such copies *have been mailed*. If the Court, in ruling on the motion, utilizes the proposed order provided by the party prevailing on the motion, the Clerk's office will not mail copies of the order to attorneys of record, but simply a notice of whether the motion was granted or denied. Only if the Court elects to rule on the motion with an order of its own design, or if elaboration is necessary, will the Clerk's office mail copies of the order.

20. At any time after ninety (90) days from the date the defendants comply with the requirements of provision (6), but no later than one hundred twenty (120) days from that date, the defendants may have, upon request and at their own expense, an independent medical examination conducted of each plaintiff for each field of medicine **[352]** applicable to that plaintiff's allegations, by a specialist in that field. No surgical procedures for the removal of tissue or other purposes other than routine blood testing shall be permitted except by order of the Court upon motion showing extraordinary circumstances. Expenses shall include the cost of the examinations, reimbursement of the plaintiff's wages for the plaintiff's actual time lost from work

to attend the examinations, and, if the examinations are conducted in a location other than the areas in which the plaintiff resides or works, any actual cost of travel, lodging, or food. The plaintiff's counsel shall be furnished with copies of all reports resulting from the examinations or from evaluations conducted for defendants of medical evidence voluntarily produced by the plaintiff, including but not limited to those of x-rays, tissue samples, blood samples, etc. The provisions of Rule 35, Federal Rules of Civil Procedure, shall apply with respect to the waiver of the patient-physician privilege. The utilization of the procedure outlined above shall not preclude any defendant from proceeding in strict accordance with the provisions of Rule 35, Federal Rules of Civil Procedure, either in lieu of the above procedure or subsequent to the utilization thereof.

21. Six (6) to nine (9) months after suit is filed, a status conference will be held by the Court or by the Magistrate. Within thirty (30) days thereafter, the parties shall exchange all exhibits to be used at trial and a list of all witnesses to be called. Thirty (30) days after this exchange, the parties shall exchange any additional exhibits and witness lists. The parties shall be allowed thirty (30) additional days from the supplemental exchange of exhibits and witness lists for any additional discovery directly related to those exhibits and lists, if not previously discovered. No additional discovery shall be permitted except by order of the Court upon motion showing extraordinary circumstances. No witnesses or exhibits that were not furnished to the opposing side in accordance with the above deadlines shall be used at trial except for impeachment purposes, except by order of the Court upon motion showing extraordinary circumstances.

22. The plaintiff's and defendants' standard MOTIONS IN LIMINE on file in the Clerk's office shall be considered in all asbestos-related cases at the time of trial. No additional matters in limine shall be filed prior to the time of the trial.

23. In the event that some of the defendants have come to agreement with the plaintiff on the terms of individual settlements before jury selection begins in the case, the Court may, on its own motion or on motion of any party, approve the indi-

vidual settlements and bring the case to trial between the plaintiff and non-settling defendants. If more than one asbestos-related case is set for jury selection on the same day, and if the non-settling defendants in the cases are the same, the Court will consider consolidating any or all of those cases for jury selection and trial.

24. If a case is removed from the docket because it is announced settled, and if any of the settling defendants have not paid their portion of the settlement within thirty (30) days of the announced settlement, then the non-paying defendants shall be liable for interest on the entire amount of settlement at the legal rate of nine percent (9%) per annum, from the date settlement was announced.

25. Checks in payment of settlement or judgment shall be sent directly from each individual defendant's attorney to the plaintiff's attorney.

26. Failure to comply with this order shall subject a party and/or its attorney to appropriate sanctions, including, but not limited to, costs and reasonable attorney's fees, the dismissal with prejudice of plaintiff's claims, or the striking of defendant's defenses.

[539]

SUPREME COURT OF NEW JERSEY

Argued April 19, 1982—Decided July 7, 1982.

EDWARD J. BESHADA, BY HIS ADMINISTRATRIX AD PROSEQUENDUM, ELEANOR BESHADA; ELEANOR BESHADA, EXECUTRIX OF THE ESTATE OF EDWARD J. BESHADA, DECEASED; GEORGE J. BURDAK AND ROSE BURDAK, HIS WIFE; JAMES D. CANNON AND BERTHA CANNON, HIS WIFE; RAYMOND D. CREED AND MARY CREED, HIS WIFE; STANLEY J. DROZD AND ROSE DROZD, HIS WIFE; HENRY J. GROBELNY AND PEARL GROBELNY, HIS WIFE; THADDEUS KASUBINSKI AND AGNES KASUBINSKI, HIS WIFE; MICHAEL KRUK; STEPHEN KUZMACK AND AMELIA KUZMACK, HIS WIFE; JOHN G. ORSAG AND SUSAN ORSAG, HIS WIFE; JOHN PLEVA AND ANN PLEVA, HIS WIFE; PAUL RARUS; STANLEY F. SAKOWSKI AND FLORENCE SAKOWSKI, HIS WIFE; BERNARD SCULLY AND MARCELLA SCULLY, HIS WIFE; JOSEPH P. SLEZAK AND JOSEPHINE SLEZAK, HIS WIFE; ARTHUR J. WALCZAK AND CATHERINE WALCZAK, HIS WIFE; DOUGLAS WHITAKER AND ELEANOR WHITAKER, HIS WIFE; HENRY WONDOWSKY AND HELEN WONDOWSKY, HIS WIFE; ALBERT F. SZCZEPANIK AND SOPHIE B. SZCZEPANIK, HIS WIFE; STANLEY GOLEMBIESKI, EXECUTOR OF THE ESTATE OF WALTER GOLEMBIESKI; AND HENRY V. KOWALESKI AND JANE KOWALESKI (FIRST NAME BEING FICTITIOUS), HIS WIFE,

Plaintiffs-Appellants,

—v.—

JOHNS-MANVILLE PRODUCTS CORPORATION; EAGLE-PICHER INDUSTRIES, INC.; MADSEN-HOWELL, INC.; RAYBESTOS-MANHATTAN, INC.; GAF CORPORATION AND UNARCO INDUSTRIES,

Defendants-Respondents,

—and—

STATE INSULATION CORP., ET AL.,

Defendants.

FRANK J. JARUSEWICZ AND MARY JARUSEWICZ, HIS WIFE; ROBERT J. RUTKOWSKI AND CAROLINE S. RUTKOWSKI, HIS WIFE; MICHAEL J. LEONARD AND ALFONSINA J. LEONARD, HIS WIFE; RUSSELL J. HAHN, AND JEAN HAHN, HIS WIFE; HENRY J. KELEHER; HARRISON LARSEN; GEORGE W. OGBORNE **[540]** AND JOAN OGBORNE, HIS WIFE; STANLEY R. PIATEK AND GLORIA J. PIATEK, HIS WIFE; MARTIN ROSENTHAL AND HELEN ROSENTHAL, HIS WIFE; JOHN O'BRIEN AND MARIJANE O'BRIEN, HIS WIFE; JOSEPH ZAKRZEWSKI AND IRENE A. ZAKRZEWSKI, HIS WIFE; ERNEST C. WEIBRECHT AND GAIL M. WEIBRECHT, HIS ~~WIFE;~~ WILLIAM MADELINE AND CHRISTINE T. MADELINE, HIS WIFE; CARLTON HOLTSLANDER AND JANE D. HOLTSLANDER, HIS WIFE; ALEXANDER HARANSKY AND DOROTHY HARANSKY, HIS WIFE; LAWRENCE A. MIZAK AND ANNA H. MIZAK, HIS WIFE; WARREN H. RAPPLEYEA, BY HIS ADMINISTRATRIX AD PROSEQUENDUM, KATHLEEN J. RAPPLEYEA; AND KATHLEEN J. RAPPLEYEA, EXECUTRIX OF THE ESTATE OF WARREN H. RAPPLEYEA, DECEASED,

Plaintiffs-Appellants

—v.—

JOHNS-MANVILLE PRODUCTS CORPORATION; A. P. GREEN REFRACTORIES CO.; METROPOLITAN REFRACTORIES, DIVISION OF A. P. GREEN REFRACTORIES CO.; QUIGLEY CO., SUBSIDIARY OF PFIZER, INC.; EAGLE-PICHER INDUSTRIES, INC.; MADSEN & HOWELL, INC.; OWENS-ILLINOIS, INC. AND UNARCO INDUSTRIES, INC.,

Defendants-Respondents,

—and—

J. H. FRANCE REFRACTORIES CORP., ET AL.,

Defendants.

JOHN HANN AND MARY HANN, HIS WIFE; MICHAEL HOMYAK AND MARY HOMYAK, HIS WIFE; STANLEY J. NOWAKOWSKI AND ANN NOWAKOWSKI, HIS WIFE; DANIEL J. PUNTILLO AND DOROTHY PUNTILLO, HIS WIFE; JAMES A. THOMAS AND ANNA THOMAS, HIS WIFE; THADEUSZ FAIST AND BARBARA FAIST, HIS WIFE,

Plaintiffs-Appellants,

—v.—

JOHNS-MANVILLE SALES CORPORATION; EAGLE-PICHER INDUSTRIES, INC. AND OWENS-ILLINOIS, INC.,

Defendants-Respondents,

—and—

PORTER HAYDEN CO., ET AL.,

Defendants.

PETER BLAZEWICZ; VINCENT S. DMUCHOWSKI, SR. AND FRANCES DMUCHOWSKI, HIS WIFE; SPASE C. ELICK AND GERALDINE ELICK, HIS WIFE; FRANK R. T. LEE AND TERESA LEE, HIS WIFE; DAVID F. LINDSAY AND JANE LINDSAY, HIS WIFE; ALBERT F. MARRAPODI AND JANE MARRAPODI (FIRST NAME BEING FICTITIOUS), HIS WIFE; SALVATORE J. PALUMBO; NICHOLAS R. SOMMA AND IDA SOMMA, HIS WIFE; JOSEPH R. TROZZO AND JENNIE TROZZO, HIS WIFE; STANLEY S. WINNICKI AND JOSEPHINE WINNICKI, HIS WIFE; JOHN W. BARBER AND IRENE BARBER, HIS WIFE; JUSTIN D. FOLLO, SR., AND FLORENCE FOLLO, HIS WIFE; JAMES W. PAPP, AND ANNA PAPP, HIS WIFE,

Plaintiffs-Appellants,

—v.—

JOHNS-MANVILLE SALES CORPORATION; EAGLE-PICHER INDUSTRIES, INC. AND OWENS-ILLINOIS, INC.,

Defendants-Respondents,

—and—

PORTER HAYDEN CO., ET AL.,

Defendants.

DOROTHY BECKWITH, AS ADMINISTRATRIX AND ADMINISTRATRIX AD PRESEQUENDUM OF THE ESTATE OF EARL BECKWITH,

Plaintiff-Appellant,

—v.—

JOHNS-MANVILLE SALES CORPORATION, SUCCESSOR TO AND IN LIEU OF JOHNS-MANVILLE PRODUCTS CORPORATION; JOHNS-MANVILLE CANADA, INC., FORMERLY KNOWN AS CANADIAN JOHNS-MANVILLE CO., LTD., CANADIAN JOHNS-MANVILLE AMIANTE, LTD., FORMERLY CANADIAN JOHNS-MANVILLE ASBESTOS, LTD., JOHNS-MANVILLE CORPORATION, UNARCO INDUSTRIES, FORMERLY KNOWN AS UNION ASBESTOS & RUBBER COMPANY; EAGLE-PICHER INDUSTRIES, INC., AND OWENS-ILLINOIS, INC.,

Defendants-Respondents,

—and—

JOHN DOE CORPORATION, ET AL.,

Defendants.

MARY CRILLEY, AS ADMINISTRATRIX OF THE ESTATE OF JAMES CRILLEY, AND MARY CRILLEY, INDIVIDUALLY,

Plaintiffs-Appellants,

—v.—

[541] ARMSTRONG CORK, ET AL.,

Defendants,

—and—

EAGLE-PICHER INDUSTRIES, INC.; JOHNS-MANVILLE CORP.; JOHNS-MANVILLE SALES CORP.; JOHNS-MANVILLE PRODUCTS CORP.; OWENS-ILLINOIS, INC. AND RAYBESTOS-MANHATTAN, INC.,

Defendants-Respondents.

Alan M. Darnell argued the cause for appellants Beshada, et al. (*Wilentz, Goldman & Spitzer,* attorneys; *Alan M. Darnell, Karen Ann Kubulak* and *Christopher M. Placitella*, on brief).

Bryan D. Garruto argued the cause for appellant Beckwith (*Heilbrunn, Finkelstein, Heilbrunn, Garruto & Galex*, attorneys).

Ronald B. Grayzel argued the cause for appellants Crilley (*Levinson, Conover, Axelrod & Wheaton*, attorneys).

David R. Gross argued the cause for respondents Johns-Manville Products Corporation, Johns-Manville Sales Corporation, successor to and in lieu of Johns-Manville Products Corporation and Johns-Manville Canada, Inc., formerly known as Canadian Johns-Manville Co. Ltd., Canadian Johns-Manville Amiante Ltd., formerly Canadian Johns-Manville Asbestos Ltd., Johns-Manville Corporation (*Budd, Larner, Kent, Gross, Picillo & Rosenbaum*, attorneys; *David J. Novack* and *Sebastian P. Lombardi*, on the brief).

Kathleen F.-Moran argued the cause for respondent Raybestos-Manhattan, Inc. (*Morgan, Melhuish, Monaghan & Spielvogel*, attorneys).

Andrew T. Berry argued the cause for respondent Owens-Illinois, Inc. (*McCarter & English*, attorneys; *Andrew T. Berry* and *Michael A. Tanenbaum*, on the brief).

Philip V. Lago submitted a brief on behalf of respondent GAF Corporation (*Hannoch, Weisman, Stern, Besser, Berkowitz & Kinney*, attorneys; *Anthony J. Marchetta*, of counsel).

William R. Connelly submitted a brief on behalf of re-**[542]**spondent Quigley Co., Inc., subsidiary of Pfizer, Inc. (*Ravin, Davis & Sweet*, attorneys).

Dennis F. Carey submitted a brief on behalf of respondent Unarco Industries, Inc., also referred to as Unarco Industries, formerly known as Union Asbestos & Rubber Company (*Dwyer, Connell & Lisbona*, attorneys).

Peter W. Sachs submitted a letter in lieu of brief on behalf of respondents A. P. Green Refractories Co. and Metropolitan Refractories, Division of A. P. Green Refractories Co. (*Sachs & Sachs*, attorneys).

James F. McNaboe submitted a letter in lieu of brief on behalf of respondent Eagle-Picher Industries, Inc. (*Schwartz* and *Andolino*, attorneys).

William J. Gannon submitted a letter in lieu of brief on behalf of respondent Madsen & Howell, Inc. (*Ryan and Gannon*, attorneys).

Ronald S. Suss submitted a brief on behalf of *amicus curiae* Karl Asch, Esq. (*Karl Asch*, attorney; *Ronald S. Suss* and *Karl Asch*, on the brief).

The Opinion of the Court was delivered by

PASHMAN, J.

The sole question here is whether defendants in a product liability case based on strict liability for failure to warn may raise a "state of the art" defense. Defendants assert that the danger of which they failed to warn was undiscovered at the time the product was marketed and that it was undiscoverable given the

state of scientific knowledge at that time. The case comes to us on appeal from the trial court's denial of plaintiffs' motion to strike the state-of-the-art defense. For the reasons stated below, we reverse the trial court judgment and strike the defense.

I

These six consolidated cases are personal injury and wrongful death actions brought against manufacturers and distributors of asbestos products. Plaintiffs are workers, or survivors of deceased workers, who claim to have been exposed to asbestos for varying periods of time. They allege that as a result of that exposure they contracted asbestosis (a non-malignant scarring of the lungs), mesothelioma (a rare cancer of the lining of the chest, the pleura, or the lining of the abdomen, the peritoneum)[1] and other asbestos-related illnesses.

These cases involve asbestos exposure dating back perhaps as far as the 1930's. The suits are first arising now because of the long latent period between exposure and the discernible symptoms of asbestosis and mesothelioma. See *Borel v. Fibreboard Paper Products Corporation*, 493 *F.*2d 1076, 1083 (5th Cir. 1973). Plaintiffs have raised a variety of legal theories to support their claims for damages. The important claim, for purposes of this appeal, is strict liability for failure to warn. Prior to the 1960's, defendants' products allegedly contained no warning of their hazardous nature. Defendants respond by asserting the state-of-the-art defense. They allege that no one knew or could have known that asbestos was dangerous when it was marketed.

There is substantial factual dispute about what defendants knew and when they knew it. A trial judge in the Eastern District of Texas, the forum for numerous asbestos-related cases, has concluded that "[k]nowledge of the danger can be attributed to the industry as early as the mid-1930's . . . ." *Hardy v. Johns-Manville Sales Corp.*, 509 *F.Supp.* 1352, 1355 (E.D. Texas 1981) (footnote omitted). Defendants respond, however,

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1 *See* Gordy-Gray, 4A *Attorneys' Textbook of Medicine* A 205C.72 (1981).

that it was not until the 1960's that the medical profession in the United States recognized that a potential health hazard arose from the use of insulation products containing asbestos. Before that time, according to defendants, the danger from asbestos was believed limited to workers in asbestos textile mills, who were exposed to **[543]** much higher concentrations of asbestos dust than were the workers at other sites, such as shipyards. Defendants claim that it was not discovered until recently that the much smaller concentrations those workers faced were also hazardous.

We need not resolve the factual issues raised. For purposes of plaintiffs' motion to strike the defense, we assume the defendants' version of the facts. The issue is whether the medical community's presumed unawareness of the dangers of asbestos is a defense to plaintiffs' claims.

II

As noted, this case involves six consolidated cases. *Jarusewicz, et al. v. Johns-Manville, et al.* is a suit by eighteen workers who were employed by Jersey Central Power and Light Company for various periods between 1930 and 1981, all of whom allege that they used asbestos, asbestos products or asbestos materials in the course of their work. They allege that they were given no warning, handling instructions or safety equipment to protect them from the dangers of asbestos. *Beshada, et al. v. Johns-Manville, et al.* is a suit by twenty-one current or former pipefitters employed at Hercules, Inc. between 1935 and the present, who allege that they worked with and around insulation products containing asbestos. *Blazewicz, et al. v. Johns-Manville, et al.* and *Hann, et al. v. Johns-Manville, et al.* involve respectively twelve and six employees of Research Cottrell, Inc., between 1936 and 1979. Plaintiff in *Beckwith, et al. v. Johns-Manville, et al.* is the widow of an electrician, Earl Beckwith, who was exposed to finished asbestos products during his work. She alleges that her husband's exposure to asbestos caused various illnesses which resulted in his death. Finally, *Crilley v. Cork, et al.* is a wrongful death action by the widow of James Crilley, who died allegedly as a result of

occupational exposure to insulation products containing asbestos.

A single trial judge has been specially assigned to hear all asbestos-related litigation in Middlesex County. On September 9, 1981, counsel for plaintiffs in four of the cases[2] filed a Motion for Partial Summary Judgment seeking to strike the state-of-the-art defense. Subsequently, plaintiffs in the other two cases joined the motion.

Plaintiffs based their motion on *Freund v. Cellofilm Properties, Inc.*, 87 *N.J.* 229 (1981), our most recent case concerning product liability. In *Freund*, Justice Handler elaborated the difference between negligence and strict liability in a failure to warn case. He explained that in strict liability cases knowledge of the dangerousness of the product is imputed to defendants. Plaintiff need not prove that defendant knew or should have known of its dangerousness. The only issue is whether the product distributed by defendant was reasonably safe. Plaintiffs urge that *Freund* disposed of the state-of-the-art issue. Since defendant's knowledge of the dangers of the product is presumed, it is irrelevant whether the existence of such dangers was scientifically discoverable. Defendants respond that *Freund* imputes to defendants only "existing knowledge, the technical knowledge available at the time of manufacture."

The trial judge denied the motion to strike. Reading *Freund* in conjunction with prior cases, *Suter v. San Angelo Foundry & Machine Company*, 81 *N.J.* 150 (1979) and *Torsiello v. Whitehall Laboratories*, 165 *N.J.Super.* 311 (App.Div.1979), the judge concluded that *Freund* merely created a rebuttable presumption that defendants had knowledge of the dangers of their product. That presumption could be overcome by proof that the knowledge at issue was "unknowable" at the time of manufacture.

Plaintiffs sought leave from the Appellate Division to appeal the trial court's interlocutory order and filed a motion with this Court for direct certification. The Appellate Division denied

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2 Plaintiffs in *Jarusewicz, Beshada, Blazewicz* and *Hann* are represented by the same counsel.

plaintiffs' motion for leave to appeal. In all but the *Crilley* case, plaintiffs moved before this Court for **[544]** leave to appeal the Appellate Division order. We granted their motion on February 25, 1982, and subsequently granted plaintiff Crilley's late motion for leave to appeal.

III

Our inquiry starts with the principles laid down in *Freund v. Cellofilm Properties, Inc.*, *supra*, *Suter v. San Angelo Foundry & Machine Company*, *supra*, and *Cepeda v. Cumberland Engineering Company, Inc.*, 76 *N.J.* 152 (1978). In *Suter*, we summarized the principle of strict liability as follows:

> If at the time the seller distributes a product, it is not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes so that users or others who may be expected to come in contact with the product are injured as a result thereof, then the seller shall be responsible for the ensuing damages. [*Id.* at 169 (footnote omitted)]

The determination of whether a product is "reasonably fit, suitable and safe" depends on a comparison of its risks and its utility (risk-utility equation).

> Central to this theory is the risk-utility equation for determining liability. The theory is that only safe products should be marketed—a safe product being one whose utility outweighs its inherent risk, provided that risk has been reduced to the greatest extent possible consistent with the product's continued utility. [*Freund*, 87 *N.J.* at 238, n.1]

In *Cepeda*, we explained that in the context of design defect liability, strict liability is identical to liability for negligence, with one important caveat: "The only qualification is as to the requisite of foreseeability by the manufacturer of the dangerous propensity of the chattel manifested at the trial—this being imputed to the manufacturer." *Cepeda*, 76 *N.J.* at 172. *See Freund v. Cellofilm Properties, Inc.*, 76 *N.J.* at 239. In so hold-

ing, we adopted the explication of strict liability offered by Dean Wade:

> The time has now come to be forthright in using a tort way of thinking and tort terminology [in cases of strict liability in tort]. There are several ways of doing it, and it is not difficult. The simplest and easiest way, it would seem, is to assume that the defendant knew of the dangerous condition of the product and ask whether he was then negligent in putting it on the market or supplying it to someone else. In other words, the scienter is supplied as a matter of law, and there is no need for the plaintiff to prove its existence as a matter of fact. Once given this notice of the dangerous condition of the chattel, the question then becomes whether the defendant was negligent to people who might be harmed by that condition if they came into contact with it or were in the vicinity of it. Another way of saying this is to ask whether the magnitude of the risk created by the dangerous condition of the product was outweighed by the social utility attained by putting it out in this fashion. [Wade, "On the Nature of Strict Tort Liability for Products," 44 *Miss.L.J.* 825, 834-35 (1973), quoted in *Cepeda*, 76 *N.J.* at 172]

Stated differently, negligence is conduct-oriented, asking whether defendant's actions were reasonable; strict liability is product-oriented, asking whether the product was reasonably safe for its foreseeable purposes. *Freund*, 87 *N.J.* at 238.[3]

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3 The imputation of knowledge is, of course, a legal fiction. It is another way of saying that for purposes of strict liability the defendant's knowledge of the danger is irrelevant. *See Freund v. Cellofilm Products, Inc.*, 87 *N.J.* at 239, quoting Keeton, "Products Liability—Inadequacy of Information," 48 *Tex.L.Rev.* 398, 407-08 (1970). The imputation of knowledge does not represent any presumption that defendants knew or even that they could have known of the product's dangers.

"Warning" cases constitute one category of strict liability cases. Their relation to the strict liability principles set forth above can best be analyzed by focusing on the definition of safe products found in footnote 1 of *Freund*. *See supra* at 200. **[545]** For purposes of analysis, we can distinguish two tests for determining whether a product is safe: (1) does its utility outweigh its risk? and (2) if so, has that risk been reduced to the greatest extent possible consistent with the product's utility? *Id.* at 238, n. 1. The first question looks to the product as it was in fact marketed. If that product caused more harm than good, it was not reasonably fit for its intended purposes. We can therefore impose strict liability for the injuries it caused without having to determine whether it could have been rendered safer. The second aspect of strict liability, however, requires that the risk from the product be reduced to the greatest extent possible without hindering its utility. Whether or not the product passes the initial risk-utility test, it is not reasonably safe if the same product could have been made or marketed more safely.[4]

Warning cases are of this second type.[5] When plaintiffs urge that a product is hazardous because it lacks a warning, they typically look to the second test, saying in effect that regardless of the overall cost-benefit calculation the product is unsafe because a warning could make it safer at virtually no added cost

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4 This dichotomy is created only for purposes of analysis, because it will help explain the role of state-of-the-art in strict liability cases. In actuality, the only test for product safety is whether the benefit outweighs the risk. However, in calculating the benefit from any product, one must consider alternate products that can yield the same benefit at lower risk. Wade, 44 *Miss.L.J.* at 837-38.

5 This two-part distinction can best be clarified by looking at how it would apply to automobiles without seatbelts. Because of the great utility of cars, few would dispute that even without seatbelts, a car's utility to society outweighs its risks. Thus, cars would be considered safe under the first aspect of the test. However, since seatbelts make cars safer without hindering utility, cars without seatbelts are deemed unsafe by virtue of the second part of the *Freund* test. Warnings are like seatbelts: regardless of the utility and risk of a product without warnings, a warning can generally be added without diminishing utility. *Freund v. Cellofilm Properties, Inc.*, 87 *N.J.* at 238-39, n. 1.

and without limiting its utility. *Freund* recognized this, noting that in cases alleging "an inadequate warning as to safe use, the utility of the product, as counter-balanced against the risks of its use, is rarely at issue." *Id.* at 242.

Freund is our leading case on strict liability for failure to warn. In *Freund*, Justice Handler applied the principles set forth above, initially laid down in *Suter* and *Cepeda*, to warning cases. The issue there was whether there is any difference between negligence and strict liability in warning cases. We stated unequivocally that there is. That difference is the same difference that we noted in *Suter* and *Cepeda* concerning other design defect cases:

> when a plaintiff sues under strict liability, there is no need to prove that the manufacturer knew or should have known of any dangerous propensities of is product—such knowledge is imputed to the manufacturer. [*Freund v. Cellofilm Properties, Inc.*, 87 *N.J.* at 239]

Thus, we held in *Freund* that it was reversible error for the trial judge to instruct the jury only with a negligence charge.

With these basic principles of design defect strict liability in New Jersey as our framework for analysis, we turn now to a discussion of the state-of-the-art defense.

IV

As it relates to warning cases, the state-of-the-art defense asserts that distributors of products can be held liable only for injuries resulting from dangers that were scientifically discoverable at the time the product was distributed. Defendants argue that the question of whether the product can be made safer must be limited to consideration of the available technology at the time the product was distributed. Liability would be absolute, defendants argue, if it could be imposed on the basis of a subsequently discovered means to make the product safer since technology will always be developing new ways to make products safer. Such a rule, they assert, would make **[546]** manufacturers liabile whenever their products cause harm, whether or not they are reasonably fit for their foreseeable purposes.

Defendants conceptualize the scientific unknowability of the dangerous propensities of a product as a technological barrier to making the product safer by providing warnings. Thus, a warning was not "possible" within the meaning of the *Freund* requirement that risk be reduced "to the greatest extent possible."

In urging this position, defendants must somehow distinguish the *Freund* holding that knowledge of the dangers of the product is imputed to defendants as a matter of law. A state-of-the-art defense would contravene that by requiring plaintiffs to prove at least that knowledge of the dangers was scientifically available at the time of manufacture.

Defendants argue that *Freund* did not specify precisely what knowledge is imputed to defendants. They construe *Freund* to impute only that degree of knowledge of the product's dangerousness that existed at the time of manufacture or distribution.[6]

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6 Defendants seek support in this regard from the following passage in *Suter*:

> Depending upon the proofs, some factors which may be considered by the jury in deciding the reasonableness of the manufacturer's conduct include the technological feasibility of manufacturing a product whose design would have prevented or avoided the accident, given the known state of the art; and the likelihood that the product will cause injury and the probable seriousness of the injury. We observe in passing that the state of the art refers not only to the common practice and standards in the industry but also to other design alternatives within practical and technological limitations at the time of distribution. [81 *N.J.* 171-72 (citation omitted)]

Defendants argue on the basis of this passage that *Suter* has explicitly accepted the state-of-the-art defense, and that *Freund* should be construed to be consistent with that reading of *Suter*.

We note, first, that this passage in *Suter* is dictum. *Suter* did not involve a state-of-the-art defense. The situation addressed in the case is not one in which the state of the art has improved between the time the product was distributed and the time of trial. Second, *Suter*, unlike *Freund* and this case, was not a warning case. The passage from *Suter* suggests only that state-of-the-art may be relevant to a safety device case, such as the seatbelt case discussed at n. 3 above.

While we agree that *Freund* did not explicitly address this question, the principles laid down in *Freund* and our prior cases contradict defendants' position. Essentially, state-of-the-art is a negligence defense. It seeks to explain why defendants are not culpable for failing to provide a warning. They assert, in effect, that because they could not have known the product was dangerous they acted reasonably in marketing it without a warning. But in strict liability cases, culpability is irrelevant. The product was unsafe. That it was unsafe because of the state of technology does not change the fact that it was unsafe. Strict liability focuses on the product, not the fault of the manufacturer. "If the conduct is unreasonably dangerous, then there should be strict liability without reference to what excuse defendant might give for being unaware of the danger." Keeton, 48 *Tex.L.Rev.* at 408.

When the defendants argue that it is unreasonable to impose a duty on them to warn of the unknowable, they misconstrue both the purpose and effect of strict liability. By imposing strict liability, we are not requiring defendants to have done something that is impossible. In this sense, the phrase "duty to warn" is misleading. It implies negligence concepts with their attendant focus on the reasonableness of defendant's behavior. However, a major concern of strict liability—ignored by defendants—is the conclusion that if a product was in fact defective, the distributor of the product should compensate its victims for the misfortune that it inflicted on them.

[547] If we accepted defendants' argument, we would create a distinction among fact situations that defies common sense. Under the defendants' reading of *Freund*, defendant would be liable for failure to warn if the danger was knowable even if defendants were not negligent in failing to discover it. Defendants

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We hold in this case that a state-of-the-art defense should not be allowed in failure to warn cases. There are strong conceptual similarities between warning and safety device cases. *See* n.3 above. Thus, the reasoning applied here may be equally applicable to cases involving failure to include appropriate safety devices in products. However, there may be distinctions between the two situations. We specifically decline to address whether a state-of-the-art defense is appropriate to safety device cases.

would suffer no liability, however, if the danger was undiscoverable. But, as Dean Keeton explains,

> if a defendant is to be held liable for a risk that is discoverable by some genius but beyond the defendant's capacity to do so, why should he not also be liable for a risk that was just as great but was not discoverable by anyone? [Keeton, 48 *Tex.L.Rev.* at 409]

We are buttressed in our conclusion that the state-of-the-art defense is inconsistent with *Freund* by the recent decision of Judge Ackerman in *Marcucci v. Johns-Manville Sales Corp.*, Nos. 76-414, 76-604 and 76-1510 (D.N.J. Feb. 19, 1982), in which he applied New Jersey law to strike defendants' state-of-the-art-defense.

The most important inquiry, however, is whether imposition of liability for failure to warn of dangers which were undiscoverable at the time of manufacture will advance the goals and policies sought to be achieved by our strict liability rules. We believe that it will.

Risk Spreading. One of the most important arguments generally advanced for imposing strict liability is that the manufacturers and distributors of defective products can best allocate the costs of the injuries resulting from those products. The premise is that the price of a product should reflect all of its costs, including the cost of injuries caused by the product. This can best be accomplished by imposing liability on the manufacturer and distributors. Those persons can insure against liability and incorporate the cost of the insurance in the price of the product. In this way, the costs of the product will be borne by those who profit from it: the manufacturers and distributors who profit from its sale and the buyers who profit from its use. "It should be a cost of doing business that in the course of doing that business an unreasonable risk was created." Keeton, 48 *Tex.L.Rev.* at 408. *See* Prosser, *The Law of Torts*, § 75, p. 495 (4th Ed. 1971).

Defendants argue that this policy is not forwarded by imposition of liability for unknowable hazards. Since such hazards by definition are not predicted, the price of the hazardous product will not be adjusted to reflect the costs of the injuries it will produce. Rather, defendants state, the cost "will be borne by the public at large and reflected in a general, across the board increase in premiums to compensate for unanticipated risks." There is some truth in this assertion, but it is not a bad result.

First, the same argument can be made as to hazards which are deemed scientifically knowable but of which the manufacturers are unaware. Yet it is well established under our tort law that strict liability is imposed even for defects which were unknown to the manufacturer. It is precisely the imputation of knowledge to the defendant that distinguishes strict liability from negligence. *Freund*, 87 *N.J.* at 240. Defendants advance no argument as to why risk spreading works better for unknown risks than for unknowable risks.

Second, spreading the costs of injuries among all those who produce, distribute and purchase manufactured products is far preferable to imposing it on the innocent victims who suffer illnesses and disability from defective products. This basic normative premise is at the center of our strict liability rules. It is unchanged by the state of scientific knowledge at the time of manufacture.

Finally, contrary to defendants' assertion, this rule will not cause the price and production level of manufactured products to diverge from the so-called economically efficient level. Rather, the rule will force the price of any particular product to reflect the cost of insuring against the possibility that the product will turn out to be defective.

Accident Avoidance. In *Suter*, we stated:

> **[548]** Strict liability in a sense is but an attempt to minimize the costs of accidents and to consider who should bear those costs. *See* the discussion in Calabresi & Hirschoff, 'Toward a Test for Strict Liability in Torts,' 81 *Yale L.J.* 1055 (1972), in which the authors suggest that the strict liability issue is to decide which party is the 'cheapest

> cost avoider' or who is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made. *Id.* at 1060. Using this approach, it is obvious that the manufacturer rather than the factory employee is 'in the better position both to judge whether avoidance costs would exceed foreseeable accident costs and to act on that judgment.' *Id.* [*Suter v. San Angelo Foundry*, 81 *N.J.* at 173-74]

Defendants urge that this argument has no force as to hazards which by definition were undiscoverable. Defendants have treated the level of technological knowledge at a given time as an independent variable not affected by defendants' conduct. But this view ignores the important role of industry in product safety research. The "state-of-the-art" at a given time is partly determined by how much industry invests in safety research. By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research.

Fact finding process. The analysis thus far has assumed that it is possible to define what constitutes "undiscoverable" knowledge and that it will be reasonably possible to determine what knowledge was technologically discoverable at a given time. In fact, both assumptions are highly questionable. The vast confusion that is virtually certain to arise from any attempt to deal in a trial setting with the concept of scientific knowability constitutes a strong reason for avoiding the concept altogether by striking the state-of-the-art defense.

Scientific knowability, as we understand it, refers not to what in fact was known at the time, but to what *could have been* known at the time. In other words, even if no scientist had actually formed the belief that asbestos was dangerous, the hazards would be deemed "knowable" if a scientist could have formed that belief by applying research or performing tests that were available at the time. Proof of what could have been known will inevitably be complicated, costly, confusing and time-consuming. Each side will have to produce experts in the history

of science and technology to speculate as to what knowledge was feasible in a given year. We doubt that juries will be capable of even understanding the concept of scientific knowability, much less be able to resolve such a complex issue. Moreover, we should resist legal rules that will so greatly add to the costs both sides incur in trying a case.

The concept of knowability is complicated further by the fact, noted above, that the level of investment in safety research by manufacturers is one determinant of the state-of-the-art at any given time. Fairness suggests that manufacturers not be excused from liability because their prior inadequate investment in safety rendered the hazards of their product unknowable. Thus, a judgment will have to be made as to whether defendants' investment in safety research in the years preceding distribution of the product was adequate. If not, the experts in the history of technology will have to testify as to what would have been knowable at the time of distribution if manufacturers had spent the proper amount on safety in prior years. To state the issue is to fully understand the great difficulties it would engender in a courtroom.

In addition, discussion of state-of-the-art could easily confuse juries into believing that blameworthiness is at issue. Juries might mistakenly translate the confused concept of state-of-the-art into the simple question of whether it was defendants' fault that they did not know of the hazards of asbestos. But that would be negligence, not strict liability.

For precisely this reason, Professor Keeton has urged that negligence concepts be carefully avoided in strict liability cases.

> **[549]** My principal thesis is and has been that theories of negligence should be avoided altogether in the products liability area in order to simplify the law, and that if the sale of a product is made under circumstances that would subject someone to an unreasonable risk in fact, liability for harm resulting from those risks should follow. [Keeton, 48 *Tex.L.Rev.* at 409 (footnote omitted)]

This Court has expressed the same concern in *Freund*, reversing the trial court's jury charge because the "terminology employed

by the trial judge was riddled with references to negligence, knowledge and reasonable care on the part of a manufacturer." 87 *N.J.* at 243. "[W]e must be concerned with the effect of the trial judge's articulation upon the jury's deliberative processes." *Id.* at 244.

V

For the reasons expressed above, we conclude that plaintiffs' position is consistent with our holding in *Freund* and prior cases and will achieve the various policies underlying strict liability. The burden of illness from dangerous products such as asbestos should be placed upon those who profit from its production and, more generally, upon society at large, which reaps the benefits of the various products our economy manufactures. That burden should not be imposed exclusively on the innocent victim. Although victims must in any case suffer the pain involved, they should be spared the burdensome financial consequences of unfit products. At the same time, we believe this position will serve the salutary goals of increasing product safety research and simplifying tort trials.

Defendants have argued that it is unreasonable to impose a duty on them to warn of the unknowable. Failure to warn of a risk which one could not have known existed is not unreasonable conduct. But this argument is based on negligence priciples. We are not saying what defendants should have done. That is negligence. We are saying that defendants' products were not reasonably safe because they did not have a warning. Without a warning, users of the product were unaware of its hazards and could not protect themselves from injury. We impose strict liability because it is unfair for the distributors of a defective product not to compensate its victims. As between those innocent victims and the distributors, it is the distributors—and the public which consumes their products—which should bear the unforeseen costs of the product.

The judgment of the trial court is reversed; the plaintiff's motion to strike the state-of-the-art defense is granted.

For reversal—Justices PASHMAN, HANDLER, POLLOCK, O'HERN and SULLIVAN, and Judge MATTHEWS—6.

For affirmance—None.

[374]

SUPREME COURT OF NEW JERSEY, 1984.

Argued January 10, 1984--Decided July 30, 1984.

CAROL ANN FELDMAN,

Plaintiff-Appellant,

—v.—

LEDERLE LABORATORIES, A CORPORATION, and AMERICAN CYANAMID COMPANY, A CORPORATION,

Defendants-Respondents.

[376] *James I. Peck, IV*, argued the cause for appellant.

James L. Melhuish argued the cause for respondents (*Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowki*, attorneys; *James L. Melhuish* and *Bernard A. Leroe*, of counsel; *James L. Melhuish* and *Kevin E. Wolff*, on the briefs).

Arthur Ian Miltz argued the cause for *amicus curiae* The New Jersey Affiliate of the Association of the Trial Lawyers of America (*Kronisch & Schkeeper*, attorneys).

John L. McGoldrick argued the cause for *amici curiae* (*McCarter & English*, attorneys for Pharmaceutical Manufacturers Association and Eli Lilly and Company; *Lum Biunno & Tompkins*, attorneys for Abbott Laboratories; *Braff, Litvak, Ertag, Wortmann & Harris*, attorneys for Burroughs Wellcome Co.; *Shanley & Fisher*, attorneys for Merck & Co., Inc.; *Porzio, Bromberg & Newman*, attorneys for Pfizer Inc. and Warner-Lambert Co.; *Kuttner & Toner*, attorneys for Schering-Plough Corp.; *Sills, Beck, Cummis, Zuckerman, Radin & Tischman*, attorneys for E.R. Squibb & Sons, Inc.; *Lamb, Hutchinson, Chapppell, Ryan and Hartung*, attorneys for The Upjohn Company; *John L. McGoldrick, Keith E. Lynott, David*

R. Kott, John F. Brenner and *Gordon M. Chapman*, on the brief).

Barry M. Epstein submitted a separate brief on behalf of *amicus curiae* E.R. Squibb & Sons, Inc. (*Sills, Beck, Cummis, Zuckerman, Radin & Tischman*, attorneys; *Marc S. Klein*, on the brief).

The opinion of the Court was delivered by

SCHREIBER, J.

In this case defendants and *amici* drug manufacturers argued that the doctrine of strict products liability should not apply to prescription drugs. We hold otherwise and conclude that drug manufacturers have a duty to warn of dangers of which they know or should have known on the basis of reasonably obtainable or available knowledge.

Plaintiff, Carol Ann Feldman, has gray teeth as a result of taking a tetracyline drug, Declomycin. Plaintiff's father, a pharmacist and a medical doctor, prescribed and administered the drug to her when she was an infant to control upper respiratory and other secondary types of infections. Since Dr. Feldman claimed that **[377]** he had administered Declomycin, suit was instituted against defendant, Lederle Laboratories,[1] which manufactured and marketed Declomycin.[2] The action was presented to the jury on the theory that the defendant was strictly liable, not because the drug was ineffective as an antibiotic, but because defendant had failed to warn physicians of the drug's side effect, tooth discoloration.

Defendant contended that the plaintiff had not proven that the drug she received was Declomycin. Rather, according to the defendant, the plaintiff could have ingested one of several other tetracycline drugs, any of which could have caused the discolor-

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1 Lederle Laboratories is a division of the defendant, American Cyanamid Company. All references in this opinion to "defendant" are to Lederle Laboratories.

2 Declomycin is defendant's trade-mark name for demethylchlortetracycline, an antibiotic that falls within the tetracycline category.

ation. Further, defendant argued that it had complied with the state of the art in its warning literature. It had not warned of possible tooth discoloration because, the defendant claimed, the possibility of that side effect was not known at the time its literature was disseminated.

The jury found for the defendant. The Appellate Division affirmed in an unreported opinion. Plaintiff petitioned for certification and we summarily remanded the cause to the Appellate Division to reconsider in light of *Beshada v. Johns-Manville Prods. Corp.*, 90 *N.J.* 191 (1982), which was decided after the Appellate Division decision. 91 *N.J.* 266 (1982). The Appellate Division reaffirmed the judgment for the defendant, holding that prescription drugs are a special category of products and that drug manufacturers would not be strictly liable for failing to warn of a side effect that was unknown when the drug was sold. 189 *N.J.Super.* 424 (1983). We granted plaintiff's petition for certification. 94 *N.J.* 594 (1983). We permitted the following *amici* to participate in the proceeding before us: ATLA-NJ, The New Jersey Affiliate of the Association of Trial Lawyers of America; The Pharmaceutical Manufacturers Association; and numerous drug manufacturers.

I

Most facts are undisputed, although there are some sharply disputed conclusions and opinions by the respective experts. Tetracyclines are a group of antibiotics that was first introduced in 1948. They are produced by different drug manufacturers that marketed the drugs under various trade names.

Defendant first marketed Declomycin in 1959. The *Physicians' Desk Reference (PDR)*, a book used by doctors to determine effects of drugs, contains data furnished by drug manufacturers about drugs, their compositions, usages, and reactions. The 1959 *PDR* entry for Declomycin stated that it had a greater antibiotic potency that made it possible to achieve therapeutic activity with less weight of antibiotic; it had a reduced renal clearance rate that produced a prolongation of the antibacterial levels in the body; and it was therapeutically equally effective as other tetracyclines in infections caused by

organisms sensitive to the tetracyclines. The *PDR* is produced annually. Until the 1965 or 1966 edition, the *PDR* did not mention that tooth discoloration was a possible side effect of Declomycin. Since 1965 or 1966 the *PDR* has stated that the drug, when administered to infants and children, could cause tooth discoloration that would be permanent if the drug were given during the developmental stage of the permanent teeth.

Plaintiff, Carol Ann Feldman, was born on February 8, 1960. Her father, Dr. Harold Feldman, asserted that he prescribed Declomycin for her approximately seven or more times from September or October, 1960, when she was eight or nine months old, until the end of 1963. She was given this drug to prevent secondary infections when she had different childhood diseases. **[378]** In his words, "[i]t was a very effective drug for what I was using it for." He had been introduced to the drug by a medical representative employed by the defendant. The representative gave him a number of samples to be distributed to patients.

Plaintiff's baby teeth were discolored gray-brown. Her permanent teeth were more deeply discolored, being primarily gray. The parties agreed that this discoloration had resulted from use of a tetracycline, although they disputed whether Declomycin was the particular tetracycline involved. In this respect defendant relied in large part upon plaintiff's testimony that her parents had told her the discoloration had been caused by "tetracycline" and on testimony that plaintiff's mother had stated to plaintiff's expert that her daughter had taken "tetracycline."

The respective experts, Dr. Bonda for the plaintiff and Dr. Guggenheimer for the defendant, agreed that scientific literature existed by 1960 that referred to tooth staining being caused by tetracycline. Dr. Bonda specifically mentioned a 1956 article by Dr. Andre reciting that tetracycline accumulated in mineralized portions of growing bones and teeth of mice; an article by Dr. Milch in the July, 1957 *Journal of the National Cancer Institute* reporting that laboratory animals had yellow fluorescents in bones, including teeth, following dosages of tetracycline; a second article by Dr. Milch in the July, 1958 issue of the

Journal of Bone and Joint Surgery again describing fluorescents in the bones and incisor teeth of rodents that had been fed tetracycline; a 1959 article by Dr. Swackman noting that of 50 children with cystic fibrosis who had received massive doses of tetracycline, 40 had dark tooth staining; a 1960 letter from Dr. Sigrelli, a Columbia University professor, to the *Pediatric Journal* observing that patients with cystic fibrosis of the pancreas who had received tetracyclines as an antibiotic suffered severe discoloration of their teeth, possibly as a result of their tetracycline use; a May, 1961 article by Dr. Sigrelli in the *New Jersey/New York State Dental Journal* containing the same information; and an essay by Dr. Bevlander on "The Effect of the Administration of Tetracycline on the Development of Teeth" in the October, 1961 issue of the *Journal of Dental Research* reflecting the adverse effect of tetracycline on developing teeth in young laboratory animals. Dr. Bonda concluded the defendant should have begun to investigate the possible effects of all forms of tetracycline on teeth no later than 1956, when the Andre article appeared.

Defendant's expert, Dr. Guggenheimer, on the other hand, noted that before 1962 the literature on tooth discoloration concerned only patients with cystic fibrosis who had been receiving massive doses of tetracyclines. He pointed out that Dr. Milch's papers described only fluorescents, not tooth staining. He testified that Declomycin did not become available until 1959 and that it would take 2½ years for permanent teeth developing in 1959 to erupt. The completion of accurate controlled studies of multiple well-documented cases would have been the only way one could really know whether Declomycin caused tooth discoloration in permanent teeth. Dr. Guggenheimer's testimony is unclear as to whether a correlation between tetracycline and tooth discoloration had been established in 1962. One reading of his testimony indicates that such a correlation was not known to exist and that only by hindsight could that conclusion be drawn. It is also possible to interpret his opinion to be that such correlation had been established in 1962. In any event it is significant that Dr. Guggenheimer gave no opinion as to 1963.

On November 16, 1962, Dr. Swanzey, defendant's Director of Regulatory Agencies Relations, wrote to the Federal Food and Drug Administration (FDA) that the defendant proposed to add to the labels on all its tetracycline products the following warning: "During therapy tetracyclines may form a stable calcium complex in bone-forming tissue with no known harmful effects. Use of any tetracycline during teeth **[379]** development in the neonatal period or early childhood may cause discoloration of the teeth." Dr. Swanzey explained that it was not necessary to obtain FDA approval before placing a warning on a label, but it was the practice to do so. On cross-examination, however, he indicated that although no FDA approval was needed to write letters to doctors informing them of this correlation, labeling the product without FDA approval could be considered a misbranding.

The FDA acknowledged receipt of Dr. Swanzey's letter on December 3, 1962, and advised him that the FDA "has been acutely interested by the increasing number of new and/or undesirable effects accompanying or following the use of these products," and would notify the defendant "as soon as any conclusion is reached." Dr. Swanzey telephoned Dr. Barzilai of the FDA, who advised against putting any statement in a circular proposed to be distributed by the defendant and that the FDA had the matter under study. On January 15, 1963, Dr. Swanzey sent to the FDA two articles on bone effects, including a copy of the Bevlander article. Dr. Swanzey also spoke with Dr. Sigrelli, who advised that staining would occur with some tetracyclines, but he had not observed that it occurred with Declomycin.

The FDA, in a letter dated February 4, 1963, proposed that the defendant insert the following warning statement in "all" its tetracycline products:

> Tetracyclines may form a stable calcium complex in any bone forming tissue with no serious harmful effects reported thus far in humans. However, use of any tetracycline drug during tooth development (= last trimester of pregnancy, neonatal period and early childhood) may cause discoloration of the teeth (= yellow-grey-

> brownish). This effect occurs mostly during long-term use of the drug but it has also been observed in usual short treatment courses.

Dr. Swanzey responded that the suggested statement was satisfactory and would be incorporated in its literature. He added that he assumed that the directive was applicable to Declomycin as well as other tetracycline drugs. The FDA replied that "[t]here is practically no specific clinical evidence to substantiate such a labeling requirement" for Declomycin and the warning would have to appear only on labeling of other tetracycline drugs. On April 12, 1963, the FDA made it clear that the warning statement was to refer not to tetracyclines generally but only to the specific brand names of the implicated products.

In 1963, the defendant received complaints from eight doctors that Declomycin was causing tooth staining. In May, 1963 the defendant referred the FDA again to the side effect of Declomycin. Commencing in mid-December, 1963, after receipt of FDA approval, it included the same warning in the Declomycin literature as in other tetracyclines.

In 1975, Dr. Feldman questioned defendant's medical representative regarding dental discoloration related to the use of tetracycline. Lloyd Carr, defendant's Product Service Manager, wrote to Dr. Feldman in response to that inquiry:

> When the causal relationship between tooth staining and tetracycline became unquestionably demonstrated by our Company, we notified the Food and Drug Administration by letter of November 16, 1962 and requested of the Food and Drug Administration that appropriate warnings be included in the labeling of our tetracycline products.
>
> During April 1963, apparently after conducting their own investigation, the Food and Drug Administration concurred and at that time the Federal Agency directed all manufacturers of tetracycline to include appropriate warnings in their labeling.
>
> In April 1963 Lederle's labeling for ACHROMYCIN® tetracycline HCl was amended accordingly. DECLOMY-

> CIN® demeclocycline HCl crystalline was specifically excluded as the Food and Drug Administration had no evidence that this **[380]** analogue caused tooth staining. However, on or about May 1963 we informed the Food and Drug Administration that DECLOMYCIN was also implicated in reports of tooth staining and during December of 1963 this warning was approved for the DECLOMYCIN labeling.

The trial court's charge to the jury was directed to two substantive issues. One was whether Declomycin was ingested by the plaintiff. The second was whether the defendant knew or should have known of the need to place a warning on its literature accompanying the sale of Declomycin and in the literature distributed to the medical profession. The trial court also stated that if the defendant did not know of the danger of tooth discoloration, and if the application of reasonably developed human skill and foresight consistent with the state of the art and the knowledge of the scientific community existing during the periods in question would not have alerted defendant to the danger, then there would have to be a finding for the defendant. The trial court also charged that the defendant's reliance on the FDA would not serve to relieve defendant of its duty to insert a warning if it knew or should have known of the need for such a warning. No exceptions were taken to the charge.

II

Does Strict Liability Apply to Manufacturers of Prescription Drugs?

The defendant never contended in its answer or at trial that the doctrine of strict liability should not apply to prescription drugs. It first raised this proposition after we had remanded the matter to the Appellate Division for reconsideration in light of *Beshada, supra,* 90 *N.J.* 191. The defendant and the drug manufacturing *amici curiae* urged that public policy as explicated in comment k to section 402A of the *Restatement (Second) of*

Torts (1965)[3] [hereinafter cited as *Restatement*] should immunize drug manufacturers from liability for side effects of prescription drugs. Comment k suggests that strict liability should not apply to certain unavoidably unsafe products. We do not agree that the protective shield of comment k immunizes all prescription drugs. Moreover, we are of the opinion that generally the principle of strict liability is applicable to manufacturers of prescription drugs.

There are some circumstances in which as a matter of public policy this Court has determined that strict liability should not be applied. Illustrative are *Magrine v. Krasnica*, 94 *N.J.Super* 228 (Cty.Ct.1967), aff'd, 100 *N.J.Super* 223 (App.Div.1968), aff'd on both opinions below, 53 *N.J.* 259 (1969); *Newmark v. Gimbel's Inc.*, 54 *N.J.* 585 (1969); *Baptista v. Saint Barnabas Medical Center*, 109 *N.J.Super.* 217 (App.Div.), aff'd o.b., 57 *N.J.* 167 (1970); and *Brody v. Overlook Hosp.*, 66 *N.J.* 448 (1975). Most recently we acknowledged that principle in *O'-Brien v. Muskin Corp.*, 94 *N.J.* 169, 186 (1983).

Certain priciples may be distilled from these cases. When the essential nature of the transaction involves a service rather than a product, public policy may dictate, in view of the status of the provider, that the general welfare is served bet**[381]**ter by inapplicability of the strict liability doctrine. Further, when the pro-

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3 § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

vider is a nonprofit institution that supplies a product and that product is vital to the public health, the doctrine may similarly be inapplicable. The common thread that runs through these cases is that in each of those situations there is a strong public policy rooted in the general welfare that justifies imposing responsibility only on the basis of a want of due care (negligence) rather than on the basis of a defective product (strict liability).

The first in this line of cases, *Magrine v. Krasnica, supra*, held that a dentist was not strictly liable when a hypodermic needle broke while in the patient's jaw. The trial court concluded that the strict liability principle was inapplicable because the dentist did not fit within the pattern of one putting goods in the stream of commerce. The dentist did not create the defect and was not in a position to control or discover a latent defect in the needle. 94 *N.J.Super.* at 234-35. According to the court, there was a basic difference between the commercial sale of a product, in which the essence of the transaction is the sale of an article, and the rendition of service by the dentist. The court reasoned that "[a] dentist or a physician offers, and is paid for, his professional services and skill. That is the *essence* of the relationship between him and his patient." *Id.* at 235 (emphasis in original). Moreover, the court concluded that imposing strict liability on the dentist would not promote the policy goals of placing the loss "on those best able to withstand it," because the dentist was unlike the manufacturer who made and placed the article in the stream of commerce. *Id.* at 239.

This reasoning was approved again in 1969 by this Court's decision in *Newmark v. Gimbel's Inc., supra*, 54 *N.J.* 585. There the plaintiff suffered a contact dermatitis as a result of a permanent wave administered in the defendant's beauty salon. We held that strict liability applied and took care to distinguish the services of hairdressers from those of dentists and doctors. We reasoned that doctors' and dentists' services

> bear such a necessary and intimate relationship to public health and welfare that their obligation ought to be grounded and expressed in a duty to exercise reasonable competence and care toward their patients. In our judgment, the nature of the services, the utility of and the need

> for them, involving as they do, the health and even survival of many people, are so important to the general welfare as to outweigh in the policy scale any need for the imposition on dentists and doctors of the rules of strict liability in tort. [54 *N.J.* at 597.]

Thereafter this Court extended immunity to certain nonprofit health care entities that furnished products essential for the public health. *Baptista v. Saint Barnabas Medical Center*, *supra*, 109 *N.J.Super.* 217, decided in the following year, held that strict liability did not apply to a hospital that had furnished incompatible, but not defective, blood for a transfusion. The court found, for the same policy reasons expressed in *Newmark*, that there was "no justification" for extending the doctrine of strict liability to such cases. 109 *N.J.Super.* at 225.

The last occasion a comparable issue was raised in this Court was in *Brody v. Overlook Hosp.*, *supra*, 66 *N.J.* 448, in 1975. There the blood used in a transfusion in a hospital was defective because it was infected with viral hepatitis. The presence of hepatitis was not discoverable by the county blood bank, a charitable nonprofit organization that supplied the blood, 121 *N.J.Super.* at 309, or by the hospital. 66 *N.J.* at 450. We held again, for the policy reasons expressed in *Newmark*, that strict liability was not appropriate. The primary reason for our decision was the public policy advocating the inapplicability of the strict liability doctrine. *Id.* The Appellate Division in that case also relied upon com**[382]**ment k to section 402A of the *Restatement, supra*, and we agreed with that reliance. 66 *N.J.* at 451.

Drug manufacturers do not fall within the policy exceptions expressed in the foregoing cases. Drug manufacturers, unlike doctors and dentists, do not render to consumers professional services involving skills in judgment and diagnosis. They produce goods and place them into the stream of commerce. Although their products may be valuable to the public, the drug manufacturers are not nonprofit or charitable institutions. They are commercial profit-making enterprises upon which product responsibility properly rests.

In addition to the above described exemptions to the doctrine of strict liability, we referred in *O'Brien v. Muskin Corp.*, *supra*, 94 *N.J.* 169, to the general category of situations in which one would reasonably conclude after a weighing of all pertinent factors, particularly those set forth in the risk-utility analysis.[4] that the strict liability principle should not be applied. *Id.* at 186. It may be that, after considering the risk-utility factors and other possible relevant considerations, a court could justifiably conclude, under some circumstances, that a manufacturer should not be strictly liable. Or, as this Court decided in *O'Brien*, the jury may be called upon to balance the risk-utility factors and decide whether the drug product should fall within the immunized category. *Id.*

The defendant has not presented any evidence to support the proposition that strict liability should not be applied to drug manufacturers that produce and distribute prescription drugs

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4 We have on other occasions referred to seven factors borrowed from Wade, "On the Nature of Strict Tort Liability for Products," 44 *Miss.L.J.* 825, 837-38 (1973), to be considered in this context. *See Cepeda v. Cumberland Eng'g Co.*, 76 *N.J.* 152, 174 (1978), and *O'Brien v. Muskin Corp.*, 94 *N.J.* 169, 182 (1983), quoting the following from Dean Wade:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

including Declomycin. Further, as observed previously, this proposition was not raised at trial. The record understandably has little, if any, evidence pertinent or material to that issue. For example, the record shows that before offering new drugs to the public, drug companies furnish certain material to scientists or doctors engaged in research. There is no evidence of the extent and nature of research that drug companies usually perform or that the defendant actually performed with respect to Declomycin. The evidence throws no light on whether all drugs should be treated alike, some being more vital to the public health and human survival than others. The evidence does not demonstrate why the drug-manufacturing industry should be placed in a different category from other manufacturers and suppliers of mass-produced products in which the enterprise bears the liability for a product that is not fit, suitable, or safe for its intended use. *Cf. Jackson v. Muhlenberg Hosp.*, 53 *N.J.* 138 (1969) (summary judgment dismissal of suit against hospital and blood bank by plaintiff, who contracted hepatitis allegedly due to blood transfusion, reversed because of inadequate record).

[383] Nor are we satisfied on this record that regulation by the FDA of the drug industry justifies such a distinction. There has been no showing of the extent to which and how the FDA applies a risk-utility analysis in deciding whether a drug should be distributed or the effect of the FDA's determination on the drug manufacturer's options to distribute or not distribute the drug with or without warnings. Indeed, the FDA's determination, even if it consisted of a risk-utility analysis, would not supplant the risk-utility balancing required in the judicial process. The record is not sufficient to analyze fully the risks and benefits of prescription drugs and to conclude that drug manufacturers should be immune from strict liability for failure to produce drugs that are safe, suitable, and fit for their intended purposes.[5]

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5 No claim is made that "the standard to measure [Declomycin] reflects a policy judgment that [it is] so dangerous that [it] create[s] a risk of harm outweighing [its] usefulness." *O'Brien, supra*, 94 *N.J.* at 181.

Defendant and drug manufacturing *amici* also contend that all prescription drugs are unavoidably unsafe and therefore that drug manufacturers of these products fall within the protective aegis of comment k of the *Restatement, supra*. Comment k reads as follows:

> *Unavoidably unsafe products*. There are some products which, in the present state of human knowledge, are quite incapable of being made *safe* for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, *and accompanied by proper directions and warning*, is not defective, nor is it *unreasonably* [emphasis in original] dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, *again with the qualification that they are properly prepared and marketed, and proper warning is given*, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk. [Emphasis added.]

Comment k immunizes from strict liability the manufacturers of some products, including certain drugs, that are unavoidably unsafe. However, we see no reason to hold as a matter of law and policy that all prescription drugs that are unsafe are unavoidably so. Drugs, like any other products, may contain defects that could have been avoided by better manufacturing or design. Whether a drug is unavoidably unsafe should be decided on a case-by-case basis; we perceive no justification for giving all prescription drug manufacturers a blanket immunity from strict liability manufacturing and design defect claims under comment k.

Moreover, even if a prescription drug were unavoidably unsafe, the comment k immunity would not eliminate strict liability for failure to provide a proper warning. As Justice Pollock stated in *O'Brien, supra*, "[w]ith those products, the determination of liability may be achieved **[384]** more appropriately through an evaluation of the adequacy of the warnings." 94 *N.J.* at 183. Thus, a manufacturer who knows or should know of the danger or side effects of a product is not relieved of its duty to warn. Rather, as the comment expressly states, it is only the unavoidably unsafe product "*accompanied by proper * * * warning*" that is not defective. (Emphasis added.) *See Needham v. White Laboratories*, 639 *F.*2d 394, 402 (7th Cir.), *cert.* denied, 454 *U.S.* 927, 102 *S.Ct.* 427, 70 *L.Ed.*2d 237 (1981); *Singer v. Sterling Drug, Inc.*, 461 *F.*2d 288, 290 (7th Cir.), *cert.* denied, 409 *U.S.* 878, 93, *S.Ct.* 131, 34 *L.Ed.*2d 132 (1972). Contrary to *amici*'s claim, we find nothing in the proceedings of the American Law Institute that justifies a different conclusion. Irrespective of whether a court or a jury decides that the drug falls within the special category of comment k, that finding may not absolve the manufacturer of its failure to warn the physician or consumer of the condition within the manufacturer's actual or constructive knowledge affecting the safety, fitness, or suitability of the drug. *See* Wade, "On the Effect in Product Liability of Knowledge Unavailable Prior to

Marketing," 58 *N.Y.U.L.Rev.* 734, 745 (1983) [hereinafter cited as Wade (1983)].[6]

In sum, we hold that none of the policy reasons for exempting certain products from strict liability is applicable to this case. Production and marketing of drugs do not fit within the

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6 A seller may be liable for an allergic response to a product when there is an implied warranty under the Uniform Commercial Code that the product is reasonably fit for the purpose for which it was acquired. *See N.J.S.A.* 12A:2-315. In *Zirpola v. Adam Hat Stores, Inc.*, 122 *N.J.L.* 21 (E. & A.1939), the Court held that under the Uniform Sale of Goods Law, *R.S.* 46:30-21(1), which provided for an implied warranty of fitness for the purpose for which a product was acquired, the defendant, the maker and seller to the plaintiff of a hat, was responsible in damages for plaintiff's allergic reaction to the hat band. In *Reynolds v. Sun Ray Drug Co.*, 135 *N.J.L.* 475 (E. & A.1947), the plaintiff successfully relied on the same implied warranty concerning a lipstick sold to her by the defendant. The Court rejected defendant's attempt to distinguish *Zirpola* on the ground that the defendant was the manufacturer and therefore knew or should have known of the poisonous ingredients in the hat band.

In *Newmark v. Gimbel's, Inc.*, 54 *N.J.* 585, 599 n. 5 (1969), this Court refused to overrule *Zirpola* and *Reynolds*, stating that "[t]hese cases hold that an implied warranty of fitness of an article for the purpose for which it is sold binds the seller even though only a small proportion of those who use such an article are injuriously affected thereby." No reference was made to comment j to section 402A of the *Restatement (Second) of Torts* (1965) indicating that a seller need give a warning only where the product contains an ingredient to which a substantial number of the population are allergic and the ingredient is one whose danger is not generally known, or if known, one that the consumer would reasonably not expect to find in the product. Comment j implies that there may not be liability if the allergic reaction occurred or would occur in an insubstantial number of users.

The implied warranty of fitness for a particular purpose has been retained in the Uniform Commercial Code in language substantially similar to the Uniform Sale of Goods Law. *Compare N.J.S.A.* 12A:2-315 *with R.S.* 46:30-21(1) (the most notable difference being elimination under the Code of a sale of an article under its patent or trade name). Such an implied warranty "extends to any natural person who is in the family or household of [the] buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty." *N.J.S.A.* 12A:2-318.

public policy exemptions for doctors, dentists, and nonprofit or charitable health care institutions. There is insufficient evidence to find that Declomycin's utility so outweighs its risks that the manufacturer should be immune from strict liability under a risk-utility analysis. Finally, Declomycin would not be exempt from strict liability under comment k to the *Restatement*, *supra*, if the defendant failed to provide an adequate warning of the possible tooth-discoloration effect of administering the drugs to infants.

III

We commence our strict liability analysis with the now familiar refrain that to establish strict liability a plaintiff must prove that the product was defective, that the defect existed when the product left the **[385]** defendant's control, and that the defect caused injury to a reasonably foreseeable user. *O'Brien*, *supra*, 94 *N.J.* at 179; *Michalko v. Cooke Color & Chem. Corp.*, 91 *N.J.* 386, 394 (1982). The defect may take one of three forms: a manufacturing flaw, a design defect, or an inadequate warning. *O'Brien*, *supra*, 94 *N.J.* at 181.

This is a strict-liability-warning case. The product has been made as the manufacturer intended. The plaintiff does not contend that it contained a manufacturing defect. Declomycin's purpose was to act as did other tetracyclines—as an antibiotic. However, it had several advantages over other antimicrobial therapeutics. The plaintiff does not dispute this. Indeed, there is no evidence that plaintiff's usage of Declomycin was not adequate in this respect. Nor was there any proof that it was improperly designed. The crux of the plaintiff's complaint is that her doctor should have been warned of a possible side effect of the drug in infants, discoloration of teeth.

The failure-to-warn strict liability classification is similar to the improper design category. *O'Brien*, *supra*, 94 *N.J.* at 181; *Freund v. Cellofilm Properties, Inc.*, 87 *N.J.* 229, 242 (1981). The manufacturer is under a duty to produce and distribute a product that is reasonably fit, suitable, and safe. It has not met that obligation if it puts a defective article into the stream of commerce that causes injury or damage. We acknowledged in

Suter v. San Angelo Foundry & Mach. Co., 81 *N.J.* 150, 176 (1979), that "a product may be unsafe because of inadequate instructions." Indeed, we held in *Freund*, *supra*, 87 *N.J.* at 236-41, that an inadequate warning could constitute a design defect.

The emphasis of the strict liability doctrine is upon the safety of the product, rather than the reasonableness of the manufacturer's conduct. It is a product-oriented approach to responsibility. *O'Brien*, *supra*, 94 *N.J.* at 180; *Freund*, *supra*, 87 *N.J.* at 238. Generally speaking, the doctrine of strict liability assumes that enterprises should be responsible for damages to consumers resulting from defective products regardless of fault. The doctrine differs from a negligence theory, which centers on the defendant's conduct and seeks to determine whether the defendant acted as a reasonably prudent person. This difference between strict liability and negligence is commonly expressed by stating that in a strict liability analysis, the defendant is assumed to know of the dangerous propensity of the product, whereas in a negligence case, the plaintiff must prove that the defendant knew or should have known of the danger. *Freund*, *supra*, 87 *N.J.* at 238-39; *Suter*, *supra*, 81 *N.J.* at 171; *Cepeda v. Cumberland Eng'g Co.*, 76 *N.J.* 152, 172 (1978); Wade (1983), *supra*, at 762-64. This distinction is particularly pertinent in a manufacturing defect context.

When the strict liability defect consists of an improper design or warning, reasonableness of the defendant's conduct is a factor in determining liability. *See Suter*, *supra*, 81 *N.J.* at 171; *Cepeda*, *supra*, 76 *N.J.* at 171-72; *Torsiello v. Whitehall Laboratories*, 165 *N.J.Super.* 311, 320 n. 2 (App.Div.), certif. denied, 81 *N.J.* 50 (1979). The question in strict liability design-defect and warning cases is whether, assuming that the manufacturer knew of the defect in the product, he acted in a reasonably prudent manner in marketing the product or in providing the warnings given. Thus, once the defendant's knowledge of the defect is imputed, strict liability analysis becomes almost identical to negligence analysis in its focus on the reasonableness of the defendant's conduct. In *Cepeda*, *supra*, 76 *N.J.* at 172, and *Suter*, *supra*, 81 *N.J.* at 171, we quoted approvingly Prosser's treatise on torts: "Since proper design is a

[386] matter of reasonable fitness, the strict liability adds little or nothing to negligence on the part of the manufacturer * * *." *W. Prosser, Law of Torts* 659 n. 72 (4th ed. 1971).

Generally, the state of the art in design defect cases and available knowledge in defect warning situations are relevant factors in measuring reasonableness of conduct. Thus in *Suter, supra*, we explained that other than assuming that the manufacturer knew of the harmful propensity of the product, the jury could consider "the technological feasibility of manufacturing a product whose design would have prevented or avoided the accident, given the known state of the art." *Id.* at 172. We observed that "the state of the art refers not only to the common practice and standards in the industry but also to the other design alternatives within practical and technological limits at the time of distribution." *Id.* Moreover, in *O'Brien, supra*, we again referred to the state of the art as an appropriate factor to be considered by the jury to determine whether feasible alternatives existed when the product was marketed. 94 *N.J.* at 183-84.

Similarly, as to warnings, generally conduct should be measured by knowledge at the time the manufacturer distributed the product. Did the defendant know, or should he have known, of the danger, given the scientific, technological, and other information available when the product was distributed; or, in other words, did he have actual or constructive knowledge of the danger? The *Restatement, supra*, has adopted this test in comment j to section 402A, which reads in pertinent part as follows:

> *Directions or warning.* In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. * * * Where the product contains an ingredient * * * whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, *if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge,* of the presence of the ingredient and the danger. [Emphasis added.]

Under this standard negligence and strict liability in warning cases may be deemed to be functional equivalents. *See Sterling Drug, Inc. v. Yarrow*, 408 *F.*2d 978, 992 (8th Cir.1969); *Chambers v. G.D. Searle & Co.*, 441 *F.Supp.* 377, 380 (D.Md. 1975), aff'd *per curiam*, 567 *F.*2d 269 (4th Cir.1977); *Incollingo v. Ewing*, 444 *Pa.* 263, 285 n. 8, 282 *A.*2d 206, 220 n.8 (1971); 2 *Interagency Task Force on Product Liability, U.S. Dep't of Commerce, Product Liability: Legal Study* 67-68 (1977). Constructive knowledge embraces knowledge that should have been known based on information that was reasonably available or obtainable and should have alerted a reasonably prudent person to act. Put another way, would a person of reasonable intelligence or of the superior expertise of the defendant charged with such knowledge conclude that defendant should have alerted the consuming public? *See Restatement, supra*, § 12(2).

Further, a manufacturer is held to the standard of an expert in the field. *Karjala v. Johns-Manville Prods. Corp.*, 523 *F.*2d 155, 159 (8th Cir.1975); *see Garst v. General Motors Corp.*, 207 *Kan.* 2, 20, 484 *P.*2d 47, 61 (1971); *Micallef v. Miehle Co.*, 39 *N.Y.*2d 376, 386, 348 *N.E.*2d 571, 578, 384 *N.Y.S.*2d 115, 121 (1976). A manufacturer should keep abreast of scientific advances. Harper and James, in their treatise on torts, explained that a manufacturer is

> held to the skill of an expert in that particular business and to an expert's knowledge of the arts, materials and processes. Thus he must keep reasonably abreast of scientific knowledge and discoveries touching his product and of techniques and devices used by practical **[387]** men in his field. He may also be required to make tests to determine the propensities and dangers of his product. [2 *F. Harper & F. James, The Law of Torts* § 28.4 (1956) (footnotes omitted).]

See 2 *R. Hursch & H. Bailey, American Law of Products Liability* 153-54 (2d ed. 1974). Were the available scientific data or other pertinent information such as to "give rise to a reasonable inference that the danger is likely to exist"? Wade (1983), *supra*, at 749. Implicit in the requirement that such a manufac-

turer is held to the standard applicable to experts in the field is the notion that at least in some fields, such as those impacting on public health, a manufacturer may be expected to be informed and affirmatively to seek out information concerning the public's use of its own product.

Furthermore, a reasonably prudent manufacturer will be deemed to know of reliable information generally available or reasonably obtainable in the industry or in the particular field involved. Such information need not be limited to that furnished by experts in the field, but may also include material provided by others. Thus, for example, if a substantial number of doctors or consumers had complained to a drug manufacturer of an untoward effect of a drug, that would have constituted sufficient information requiring an appropriate warning. *See Hoffman v. Sterling Drug, Inc.*, 485 *F.*2d 132, 146 (3d Cir.1973) (in judgment for plaintiff alleging negligence and strict products liability in failure-to-warn case against prescription drug manufacturer of Aralen, court found jury question whether defendants used foresight appropriate to their enterprise in view of the number of letters from physicians reporting visual injury in patients using Aralen and subsequent medical literature); *Skill v. Martinez*, 91 *F.R.D.* 498, 514 (D.N.J.1981), aff'd on other grounds, 677 *F.*2d 368 (3d Cir.1982) (jury finding in products liability action for plaintiff upheld because "sufficient knowledge" existed, in the form of articles of preliminary findings by two leading researchers in the field, of danger inherent in taking birth-control pill while smoking to warrant drug manufacturer's giving proper warning); *Hamilton v. Hardy*, 37 *Colo.App.* 375, 385, 549 *P.*2d 1099, 1108 (1976) (under strict liability theory, manufacturer of prescription drugs must warn of dangers and risks, whether or not a causal relationship between use of product and various attendant injuries has been definitively established at the time of the warning); *McKee v. Moore*, 648 *P.*2d 21, 24 (Okla.1982) (duty to warn requires prescription drug manufacturer to maintain current information "gleaned from research, adverse reaction reports, scientific literature and other available methods") (footnote omitted); 39 Fed.Reg. 33,230-31 (1974) (FDA requires warnings

on drug labels "when there is significant medical evidence of a possible health hazard, without waiting for a causal relationship to be established by definitive studies which, in some instances, may not be feasible or would take many years").

This test does not conflict with the assumption made in strict liability design defect and warning cases that the defendant knew of the dangerous propensity of the product, if the knowledge that is assumed is reasonably knowable in the sense of actual or constructive knowledge. A warning that a product may have an unknowable danger warns one of nothing. Neither *Cepeda* nor *Suter* stated that the manufacturer would be deemed to know of the dangerous propensity of the chattel when the danger was unknowable. *See Ferrigno v. Eli Lilly and Co.*, 175 *N.J.Super.* 551, 576 (Law Div.1980). In our opinion *Beshada*, *supra*, would not demand a contrary conclusion in the typical design defect or warning case. If *Beshada* were deemed to hold generally or in all cases, particularly with respect to a situation like the present one involving drugs vital to health, that in a warning context knowledge of the unknowable is irrelevant in determining the applicability of strict liability, we would not agree. Many commentators have criticized this aspect of the **[388]** *Beshada* reasoning and the public policies on which it is based. *See, e.g.*, Page, "Generic Product Risks: The Case Against Comment K and for Strict Tort Liability," 58 *N.Y.U.L.Rev.* 853, 877-82 (1983); Schwartz, "The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine," 58 *N.Y.U.L.Rev.* 892, 901-05 (1983); Wade (1983), *supra*, at 754-56; Comment, "Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects," 71 *Geo.L.J.* 1635 (1983); Comment, "*Beshada v. Johns Manville Products Corp.*: Adding Uncertainty to Injury," 35 *Rutgers L.Rev.* 982, 1008-15 (1983); Note, "Products Liability—Strict Liability in Tort—State-of-the-Art Defense Inapplicable in Design Defect Cases," 13 *Seton Hall L.Rev.* 625 (1983). *But see Hayes v. Ariens Co.*, 391 *Mass.* 407, 413, 462 *N.E.*2d 273, 277-78 (1984) (citing *Beshada* with approval for the proposition that in strict liability the seller "is presumed to have been informed at the time of sale of all risks whether or not he

actually knew or reasonably should have known of them"). The rationale of *Beshada* is not applicable to this case. We do not overrule *Beshada*, but restrict *Beshada* to the circumstances giving rise to its holding. *See, e.g., Friedman v. Podell*, 21 *N.J.* 100, 105 (1956); *Konrad v. Anheuser-Busch, Inc.*, 48 *N.J.Super.* 386, 388 (Law Div.1958) ("Cases state principles but decide facts, and it is only the decision on the facts that is binding precedent."). We note, in passing, that, although not argued and determined in *Beshada*, there were or may have been data and other information generally available, aside from scientific knowledge, that arguably could have alerted the manufacturer at an early stage in the distribution of its product to the dangers associated with its use.

In strict liability warning cases, unlike negligence cases, however, the defendant should properly bear the burden of proving that the information was not reasonably available or obtainable and that it therefore lacked actual or constructive knowledge of the defect. Wade (1983), *supra*, at 760-61; *see* Pollock, "Liability of a Blood Bank or Hospital for a Hepatitis Associated Blood Transfusion in New Jersey," 2 *Seton Hall L.Rev.* 47, 60 (1970) ("burden of proof that hepatitis is not detectable and unremovable should rest on the defendant" blood bank or hospital). The defendant is in a superior position to know the technological material or data in the particular field or specialty. The defendant is the expert, often performing self-testing. It is the defendant that injected the product in the stream of commerce for its economic gain. As a matter of policy the burden of proving the status of knowledge in the field at the time of distribution is properly placed on the defendant. *See State v. Toscano*, 74 *N.J.* 421, 443 (1977) (shifting burden to criminal defendant of proving duress); *Anderson v. Somberg*, 67 *N.J.* 291, 300-02 (*per* Pashman, J., with two Justices concurring, and one Justice concurring in the result) (placing burden of persuasion on multiple defendants in malpractice action where plaintiff was not in a position to identify the responsible party), *cert.* denied, 423 *U.S.* 929, 96 *S.Ct.* 279, 46 *L.Ed.*2d 258 (1975); *cf. Griggs v. Bertram*, 88 *N.J.* 347, 365-68 (1982) (in insurance case, shifting to settler insured burden of going for-

ward, but not of persuasion, on question of whether a settlement was made in good faith); *NOPCO Chem. Div. v. Blau-Knox Co.*, 59 *N.J.* 274, 284-85 (1971) (shifting burden of production to defendants where machine damaged in transit but buyer did not know which carrier or bailee had damaged it).

One other aspect with respect to warnings based on subsequently obtained knowledge should be considered. Communication of the new warning should unquestionably be given to prescribing physicians as soon as reasonably feasible. Although a manufacturer may not have actual or constructive knowledge of a danger so as to impose upon it a duty to warn, subsequent**[389]**ly acquired knowledge, both actual and constructive, also may obligate the manufacturer to take reasonable steps to notify purchasers and consumers of the newly-discovered danger. *Compare Bacardi v. Holzman*, 182 *N.J.Super.* 422, 425 (App.Div.1981) (holding that "[t]he manufacturer has no duty to prepare a warning for the consumer when, under all circumstances, the product only comes into the consumer's hands after it is prescribed by the physician"), *with Lukaszewicz v. Ortho Pharmaceutical Corp.*, 510 *F.Supp.* 961 (E.D.Wis.1981) (manufacturer of oral contraceptive had duty under strict liability to warn patients directly of possible side effects where FDA regulation mandated such warning and Wisconsin law made a violation of such a regulation negligence *per se*) *and Pharmaceutical Mfrs. Ass'n v. Food and Drug Administration*, 484 *F.Supp.* 1179, 1182 (D.Del.), aff'd *per curiam*, 634 *F.*2d 106 (3d Cir.1980) (upholding FDA regulation requiring direct warning to consumers of prescription drugs containing estrogens because Congress, in enacting the Food, Drug, and Cosmetic Act, "intended patients using prescription drugs, as well as those using over-the-counter drugs, to receive" material facts directly).

The timeliness of the warning issue is obliquely present in this case. It is possible that Dr. Feldman already had Declomycin on hand when defendant became aware of Declomycin's side effect. If that state of affairs existed, defendant would have had an obligation to warn doctors and others promptly. This most assuredly would include those to whom defendant had already furnished the product. *See Schenebeck v. Sterling Drug, Inc.*,

423 *F.*2d 919, 922 (8th Cir.1970); *Basko, supra*, 416 *F.*2d at 426. *See generally* Note, "The Manufacturer's Duty to Notify of Subsequent Safety Improvements," 33 *Stan.L.Rev.* 1087 (1981). The extent and nature of post-distribution warnings may vary depending on the circumstances, but in the context of this case, the defendant at a minimum would have had a duty of advising physicians, including plaintiff's father, whom it had directly solicited to use Declomycin.

The trial court charged the jury that the manufacturer of a drug has the obligation to warn if he knew or should have known of the need to issue such a warning. In determining whether defendant should have known of the danger, it referred the jury to the circumstances, relating particularly to the state of knowledge, as evidenced by the literature, in the scientific community. However, upon the retrial the charge should also include the principle expressed herein that a reasonably prudent drug manufacturer should be deemed to know of reasonably obtainable and available reliable information.[7] In addition, we now place the burden of proving the lack of knowledge on the defendant.

IV

At the second proceeding before the Appellate Division, the defendant raised for the first time the claim that it could not lawfully have modified the warnings without FDA approval, an approval that was not obtained until the end of 1963. It raised this defense even though its witness, Dr. Swanzey, testified there was "no prohibition" against inserting the additional warning without FDA approval. Indeed, defendant did not object to the trial court's charge that the FDA's actions "would not serve to relieve the defendant of any obligation to place a warning if in fact during the critical periods involved in this case it knew or should have known of the need for such a warning." Under these circumstances we would ordinarily defer discussion

7 The plaintiff did not object to the charge and did not raise this issue on her initial appeal. Since the cause must be retried, see Point V herein, and the issue was raised and argued before us, we have decided the question.

of the issue. However, since the trial court may be faced with the problem on the retrial, see Point V herein, some comments are in order.

[390] Defendant bases its contention on an FDA regulation, 21 *C.F.R.* § 130.9 (1964). That regulation provided that "[t]he holder of an effective new-drug application should submit * * * full details of any proposed change or changes, and he will be notified in writing whether, in the Food and Drug Administration's opinion, the submission of a supplemental application is *required* for such change or changes." 25 Fed.Reg. 12,595 (1960) (emphasis added). We note that the regulation did not prevent a drug manufacturer from adding an additional warning as soon as it was aware of its necessity. Nor has counsel submitted to us any FDA administrative decision to the contrary effect. It would seem anomalous for the FDA to have prevented a drug manufacturer from advising the public immediately of a newly discovered danger while waiting for FDA approval. *But see Roginsky v. Richardson-Merrell, Inc.*, 378 *F.*2d 832, 835, 848 (2d Cir.1967) (in dictum citing 21 *C.F.R.* § 130.9 for the proposition that FDA regulations required approval before modification). Such a stand would have undercut the primary purpose of protecting the public under the Food, Drug, and Cosmetic Act, 21 *U.S.C.* §§ 301-92 (1972) (the Act). *See 62 Cases of Jam v. United States*, 340 *U.S.* 593, 596, 71 *S.Ct.* 515, 518, 95 *L.Ed.* 566, 570 (1951). Furthermore, in 1965 the regulation was amended, 30 Fed.Reg. 993-94 (1965), to require that drug manufacturers inform the public immediately of newly discovered dangers before waiting for the FDA to act. *See McEwen v. Ortho Pharmaceutical Corp.*, 270 *Or.* 375, 398, 528 *P.*2d 522, 534-35 (1974) (construing the 1965 amendment to give drug manufacturers, and not the FDA, responsibility for the adequacy and timeliness of warnings); *see also* 44 Fed.Reg. 37, 447 (1979) (FDA discussing the 1965 amendment and citing *McEwen*).

Defendant also argues that the plaintiff's cause of action for personal injury due to mislabeling is barred because Congress has preempted the field by enacting the Act pursuant to its power under the commerce clause. *United States v. Walsh*, 331

U.S. 432, 434, 67 *S.Ct.* 1283, 1284, 91 *L.Ed.* 1585, 1587 (1947). The preemption question thus centers on whether Congress intended to eliminate a plaintiff's common law action for negligence or for production and distribution of a defective drug product.

The cause of action under state law involves the injury suffered by a particular plaintiff and focuses for preemption purposes on whether the federal statute, expressly or impliedly, indicates exclusivity; whether the federal scheme is so pervasive that it precludes such litigation; and whether such causes of action are "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 *U.S.* 52, 67-68, 61 *S.Ct.* 399, 404-405, 85 *L.Ed.* 581, 587 (1941) (footnote omitted). *See generally U.S.A. Chamber of Commerce v. State*, 89 *N.J.* 131, 141-43 (1982) (discussing preemption).

Justice Brennan reminds us that "[t]he principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers v. Paul*, 373 *U.S.* 132, 142, 83 *S.Ct.* 1210, 1217, 10 *L.Ed.*2d 248, 257, reh'g denied, 374 *U.S.* 858, 83 *S.Ct.* 1861, 10 *L.Ed.*2d 1082 (1963).

Defendant has not directed our attention to anything in the Act or in the legislative history suggesting that Congress intended that an individual's cause of action for personal injuries due to a failure to warn was to be eliminated. Defendant's reliance on *Cosmetic, Toiletry & Fragrance Ass'n v. Minnesota*, 440 *F.Supp.* 1216 (D.Minn.1977), aff'd *per curiam*, 575 *F.*2d 1256 (8th Cir.1978), is misplaced. *Cosmetic, Toiletry* involved an FDA regulation and a Minnesota statute, both of which required identical warnings on certain aerosol containers but **[391]** differed most significantly on where the warnings should be placed. 440 *F.Supp.* at 1219. The state argued that manufacturers could meet both requirements. The district court rejected this argument and held that "the nature of consumer product

labeling requires exclusive federal regulation in order to achieve uniformity vital to national interests." *Id.* at 1223. This case stands only for the proposition that in limited areas, *viz*, location of a label on the container and not the content of the label, state action had been preempted by specific federal regulations. *See Pharmaceutical Soc'y of New York v. Lefkowitz*, 586 *F.*2d 953, 958 (2d Cir.1978) (the Act preempts neither all state regulation of drugs nor all state regulation of drug labeling). On the other hand, it has been stated that the FDA's "regulations and requirements" are "minimal" standards and that "[t]he Defendant still owes a duty to warn of dangers of which it knew or should have known in the exercise of reasonable care." *Stromsodt v. Parke-Davis & Co.*, 257 *F.Supp.* 991, 997 (D.N.D.1966), aff'd, 411 *F.*2d 1390 (8th Cir. 1969); *accord Brochu v. Ortho Pharmaceutical Corp.*, 642 *F.*2d 652, 658-59 (1st Cir.1981) (when by 1970 oral contraceptive manufacturer had information not available in 1968, it could be expected to do more than satisfy 1968 FDA uniform labeling requirements); *Bristol-Myers Co. v. Gonzales*, 548 *S.W.*2d 416, 423 (Tex.Civ.App.1976), aff'd, 561 *S.W.*2d 801, 804 (Tex.1978) (instructions that did not recommend the proper frequency of drug use are not adequate as a matter of common law, even when they have been approved by the FDA).

The underlying conduct that is the essence of the private cause of action is not exclusively regulated under the Act. Hence the state cause of action does not constitute regulation of conduct that Congress intended to protect. Further, there is a strong state interest in compensating those who are injured by a manufacturer's defective products. There is little risk that this cause of action would interfere with the effective administration of the Act, an important factor in preemption analysis. *See Farmer v. United Bhd. of Carpenters and Joiners*, 430 *U.S.* 290, 302, 97 *S.Ct.* 1056, 1064, 51 *L.Ed.*2d 338, 351 (1977). In our opinion, the record does not justify defendant's preemption claim.

V

The jury was given two basic issues: (1) did plaintiff take Declomycin, and (2) did defendant know (actually or constructively) of its side effect. The jury returned a general verdict for the defendant and we do not know the basis of its decision. *See Ettin v. Ava Truck Leasing, Inc.*, 53 *N.J.* 463, 480 (1969). We must assume, therefore, that the jury's determination hinged on the absence of proof of knowledge. *Cf. Neumann v. Wildermann*, 35 *N.J.Super.* 562, 566 (App.Div.1955) (when there are two theories of liability, jury should be instructed to return separate verdicts on each theory unless it should find for defendant on all grounds, in which case a general verdict would be acceptable).

Plaintiff moved for a new trial on the ground that the verdict was against the weight of the evidence. The trial court denied the motion, resting its decision on what defendant's knowledge of the graying side effect was or should have been in 1960. Upon her first appeal, plaintiff raised the weight-of-the-evidence argument again and the Appellate Division affirmed, relying on the trial court's opinion. We do not agree because, during at least some of the period when the defendant was marketing Declomycin and the drug was being administered to plaintiff, defendant, fully aware of the discoloring side effect, continued distributing it without warning.

A trial court shall grant a motion for a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." *R.* 4:49-1(a). This Court has construed a verdict that is "a miscarriage of justice" as **[392]** one that "shock[s] the conscience of the court and convince[s] it that to sustain the verdict would be manifestly unjust." *Carrino v. Novotny*, 78 *N.J.* 355, 366 (1979). The trial court does not sit as a thirteenth juror but canvasses the record "to correct clear error or mistake by the jury." *Dolson v. Anastasia*, 44 *N.J.* 2, 6 (1969). On a motion for a new trial, a trial court takes into account not only the tangible evidence presented but also the "intangible 'feel of the

case' " and "matters of credibility," *i.e.*, demeanor evidence. *Id.*

A trial court's determination is "not reversed [by an appellate court] unless it clearly appears that there was a miscarriage of justice under the law." *R.* 2:10-1. The standard for appellate review of a trial court's decision on a motion for a new trial is substantially the same as that controlling the trial court except that due deference should be made to its "feel of the case," including credibility. When criteria that are not transmitted by the written record, such as witness demeanor, are determinative,

> the appellate court must give deference to the views of the trial judge thereon. His decision, however, is not entitled to any special deference where it rests upon a determination as to worth, plausibility, consistency or other tangible considerations apparent from the face of the record with respect to which he is no more peculiarly situated to decide than the appellate court. [*Dolson v. Anastasia, supra*, 55 *N.J.* at 7.]

The trial court erred in fixing the date at which defendant's actual or constructive knowledge was to be measured. It was undisputed that plaintiff had received Declomycin or another tetracycline from approximately September, 1960 until the end of 1963. When the trial court considered the motion, it referred to the conflict in the evidence on whether defendant knew or should have known of the correlation between an infant's ingestion of Declomycin and tooth discoloration in *1960*, when the plaintiff first began receiving the drug.

However, the evidence is overwhelming that at least by mid-November, 1962, defendant had sufficient information to warrant that it warn doctors of the possible tooth discoloration effects of Declomycin when administered to infants. According to Dr. Swanzey, then defendant's Director of Regulatory Agency Relations, defendant had "strong suspicions" of the connection between tetracyclines and the discoloration of the teeth by the end of 1962. However, the defendant's actions indicate that its awareness at that time went beyond the stage of sus-

picion. There was no equivocation in its letter to the FDA on November 16, 1962. The letter proposed that defendant add to the labels on all its tetracycline products, including Declomycin, the following warning: "Use of *any* tetracycline during teeth development in the neonatal period or early childhood may cause discoloration of the teeth." (Emphasis added.) Lloyd Carr, defendant's Product Service Manager, explained in a letter to Dr. Feldman that "[w]hen the causal relationship between tooth staining and tetracycline became *unquestionably* demonstrated by our Company, we notified the Food and Drug Administration by letter of November 16, 1962." (Emphasis added.) Mr. Carr testified that he was referring in his letter to all of defendant's tetracycline drugs, including Declomycin. Viewing the testimony of Dr. Guggenheimer, defendant's expert witness, from the viewpoint most favorable to defendant, he testified that a manufacturer could not have been expected to draw a correlation between tooth discoloration and Declomycin in 1962, although, at the time of trial, in hindsight, it was clear that the correlation in fact existed in 1962.

Apart from plaintiff's evidence to the effect that defendant should have known of the side effect as early as 1960, the record overwhelmingly demonstrates that defendant actually knew of the danger by the end of 1962. Defendant nonetheless continued to market the drug in 1963 and plaintiff **[393]** continued to ingest the drug that year. Insofar as that period of time is concerned, a jury determination based on defendant's lack of knowledge would be "a miscarriage of justice under the law." *See R.* 2:10-1. In that event defendant would be responsible at least for the enhancement of the condition.

We reverse and remand for a new trial.

For reversal and remandment—Chief Justice WILENTZ and Justices CLIFFORD, SCHREIBER, HANDLER, POLLOCK, O'HERN and GARIBALDI—7.

For affirmance—None.

SUPREME COURT OF NEW JERSEY

[700] IN THE MATTER OF ASBESTOS LITIGATION VENUED IN MIDDLESEX COUNTY.

December 4, 1984.

ORDERED that the motions for direct certification of the motions for leave to appeal now pending in the Appellate Division of Superior Court are granted; and it is further

ORDERED that leave to appeal is granted, and this Court, in *Feldman v. Lederle Laboratories*, 97 *N.J.* 429 (1984), having recognized that *Beshada v. Johns-Manville*, 90 *N.J.* 191 (1980), applies to all pending asbestos cases, the September 21, 1984 Order of the Superior Court, Law Division, is summarily affirmed.

[466]

SUPREME COURT OF NEW JERSEY

Argued November 5, 1984—Decided July 31, 1986.

JAMES FISCHER and GENEVA FISCHER,

Plaintiffs-Respondents,

—v.—

JOHNS-MANVILLE CORPORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, JOHNS-MANVILLE SALES CORPORATION, CANADIAN JOHNS-MANVILLE ASBESTOS, LTD., CANADIAN JOHNS-MANVILLE CO., LTD., CANADIAN JOHNS-MANVILLE MINING COMPANY, LTD.,

Defendants-Appellants,

—and—

BELL ASBESTOS MINES, LTD.,

Defendant.

[467]

David R. Gross argued the cause for appellants (*Budd, Larner, Kent, Gross, Picillo & Rosenblum*, attorneys; *David J. Novak*, of counsel; *Sebastian P. Lombardi*, on the brief).

Karl Asch argued the cause for respondents (*Ronald S. Suss*, on the brief).

The opinion of the Court was delivered by

CLIFFORD, J.

Plaintiff James Fischer and Geneva Fischer, his wife, brought suit against multiple defendants seeking to recover damages for lung diseases suffered by James Fischer as a result of his exposure to asbestos. The complaint sought compensatory and punitive damages from defendants-suppliers of asbes-

tos under negligence, breach of warranty, and strict products liability theories. Plaintiffs elected to press at trial only the strict liability cause of action for compensatory damages, while at the same time they sought punitive damages. There were dismissals of numerous defendants before and during trial, leaving at the close of trial only the Johns-Manville defendants[1] (hereinafter Johns-Manville or **[468]** defendant) and Bell Asbestos Mines, Ltd. (Bell).

The case was tried to a jury. At the close of trial, the jury awarded compensatory damages of $86,000 to James Fischer and $5,000 to Geneva Fischer. The jury found Johns-Manville eighty percent liable and Bell twenty percent liable. The jury also awarded James Fischer $300,000 in punitive damages, of which $240,000 was assessed against Johns-Manville and $60,000 against Bell. Both defendants appealed and the Appellate Division affirmed in its entirety the judgment of the trial court. 193 *N.J.Super.* 113 (1984).

In the court below Johns-Manville did not dispute the award of compensatory damages, nor did it "challenge either the amount of the punitive damages allowed or the trial judge's instructions respecting the standards which the jury was to apply in considering an award of punitive damages." 193 *N.J.Super.* at 120. Rather the contentions were that punitive damages are "not allowable at all" in strict product liability actions, *ibid*, and that even if they are, the proofs were inadequate to meet the necessary standard of "outrageous conduct in deliberate disregard of the rights of others," *ibid*, both of which contentions the Appellate Division rejected.

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1 "Johns-Manville defendants" includes Johns-Manville Corporation; Johns Manville Sales Corporation, successor to and in lieu of Johns-Manville Products Corporation; Johns-Manville Canada, Inc., formerly known as Canadian Johns-Manville Co., Ltd.; and Johns-Manville Amiante Canada, Inc., formerly known as Canadian Johns-Manville Asbestos, Ltd. After the start of this suit, Johns-Manville Canada, Inc. and Johns-Manville Amiante Canada, Inc. changed their names to JM Asbestos, Inc. and 126692 Canada, Inc., respectively, and thereafter were amalgamated with a third corporation. The resultant corporation now conducts business under the name of JM Asbestos, Inc.

We granted certification, 97 *N.J.* 598 (1984), after which defendant Bell withdrew its appeal. In addition to its general argument that the case before us is one of great public importance, Johns-Manville's petition urges that the Appellate Division's determination runs counter to decisions by New Jersey federal district courts and thus requires clarification. As well it repeats the arguments made below, that (1) punitive damages "cannot conceptually flow" from a claim based on strict liability for failure to warn, (2) punitive damages "serve no purpose" in asbestos mass litigation, and (3) the record does not support a finding of punitive damages against Johns-Manville. As did the Appellate Division, we reject those contentions. We therefore affirm.

I

A full understanding of the background of this case requires a fairly extensive repetition of the pertinent facts set out in Judge Pressler's comprehensive opinion for the Appellate Division.

James Fischer worked for Asbestos Limited in Millington, Morris County, from 1938 until 1942, and then again in 1945. During his employment his varied duties included bagging asbestos fiber, grinding asbestos ore into fiber, and mixing asbestos fibers with other materials for the manufacture of insulation materials. From 1942 through 1945 and from 1946 through 1947 Fischer toiled as a farm worker; in 1947 he took employment with National Starch Chemical Company in Plainfield. His only exposure to asbestos was while working at Asbestos Limited. During that time he received no cautionary warnings about any dangers of asbestos, nor was he instructed in the safe handling of asbestos by either his employer or the suppliers of asbestos materials, identified at trial as Johns-Manville and Bell.

Fischer suspected that he might be suffering from asbestos-related problems when in 1977 his pulmonary disease first manifested itself. His suspicions were confirmed in 1978, at which time he was given medication that ultimately produced such side effects as diabetes, rheumatoid arthritis, and osteoporosis.

His progress thereafter continued downhill: in 1979 he entered the hospital for treatment of bronchitis with borderline pneumonia; although he returned to work thereafter, he experienced a heart attack in February 1980, when he was 61 years old. He has not worked since. His treating physician attributed his total disability as due 30% to chronic obstructive lung disease traceable to smoking, 60% to asbestos exposure and the side effects of the medication pre**[469]**scribed for pulmonary problems, and 10% to the heart condition.

The Appellate Division, focusing on what Johns-Manville knew and when it knew it, narrowed the issue to defendant's "actual knowledge." 193 *N.J.Super.* at 117. It viewed the "essential controversy" as whether defendants "did in fact have knowledge of the hazards of asbestos during the time of plaintiff's exposure some 45 years ago"—"essential," because plaintiffs' punitive damage claim hinged on their contention that "defendants knew of these hazards as early as the 1930's and had made a conscious business decision to withhold this information from the public." *Ibid.* In particular, plaintiffs contended that defendants, "with full knowledge of the risks, deliberately chose not to give those warnings to users of the product, which might have enabled them to obtain protection from prolonged exposure." *Ibid.* It was this conduct that plaintiffs labelled as "outrageous and flagrant," in disregard of "the substantial health risks to which defendants subjected the public * * *." That conduct therefore "justified the imposition of punitive damages." *Ibid.*

The Appellate Division summarized the evidence in support of those allegations as follows.

> Johns-Manville, in its answers to interrogatories, which were read to the jury, admitted that
>
> > [t]he corporation became aware of the relationship between asbestos and the disease known as asbestosis among workers involved in mining, milling and manufacturing operations and exposed to high levels of virtually 100% raw asbestos fibers over long periods of time by the early 1930s. The corporation has fol-

> lowed and become aware of the general state of the medical art relative to asbestos and its relationship to disease processes, if any.

In response to plaintiffs' request for admissions, also read to the jury, it admitted that in the early 1940's it knew that asbestos "was dangerous to the health" of those industrial workers who were exposed to excessive amounts of the material. Plaintiffs, moreover, produced as a witness Dr. Daniel C. Braun, president of the Industrial Health Foundation, a research organization which develops, accumulates and disseminates information about occupational diseases. Dr. Braun testified that Johns-Manville has been a member of the Foundation since 1936. He also testified that since 1937 the Foundation has sent to its members a monthly digest of articles appearing in scientific journals which relate to occupational disease. Relevant portions of the digests, which were admitted into evidence, included references to eleven scientific articles published between 1936 and 1941 documenting the grave pulmonary hazards of exposure to asbestos and discussing measures which could be taken to protect workers. Plaintiffs also proved that as early as 1933 claims were being made against Johns-Manville by asbestos workers, and in November of that year the Executive Committee of its Board of Directors passed a resolution authorizing the president of the corporation

> to enter into negotiations for the settlement of any actions now pending or which may be hereafter brought against the Corporation by former employees founded upon alleged injury or disease resulting from their employment by the Corporation and, in his discretion, to settle any such cases upon such terms as he shall, in his uncontrolled discretion, deem advisable and for the best interest of the Corporation.

In December of that year high-level representatives of Johns-Manville met with officials of Raybestos-Manhattan, another major asbestos supplier, to discuss steps which the industry as a whole might take to reduce employee risk. It appears, however, that Johns-Manville never did arrange for or participate in any industry-wide meetings on the subject. The minutes of that 1933 meeting **[470]** also confirm the participants' view that at least for the time being "our past policy of keeping this matter confidential is to be pursued."

Perhaps most damning of all is the so-called Sumner Simpson correspondence of 1935 and 1941. Simpson was president of Raybestos. In October 1935, he received a letter from a Miss Rossiter, editor of the trade periodical *Asbestos*, suggesting that despite Simpson's earlier requests, made "for certain obvious reasons," that articles relating to asbestosis not be published, perhaps the time had come to print a positive article about industry efforts to reduce the risk in order "to combat some of the rather undesirable publicity given to it [asbestosis] in current newspapers." Simpson thereupon sent a copy of the letter to Johns-Manville's secretary, Vandiver Brown, expressing his opinion that "the less said about asbestos, the better off we are." Brown's reply stated in part:

> I quite agree with you that our interests are best served by having asbestosis receive the minimum of publicity. Even if we should eventually decide to raise no objection to the publication of an article on asbestosis in the magazine in question, I think we should warn the editors to use American data on the subject rather than English. Dr. Lanza has frequently remarked, to me personally and in some of his papers, that the clinical picture presented in North American localities where there is an asbestos dust hazard is considerably milder than that reported in England and South Africa.

Some seven years later, in 1941, Brown wrote to Simpson regarding Miss Rossiter's proposal to include in a forthcoming issue of *Asbestos* a review of a book apparently linking asbestos exposure with pneumoconiosis. Noting that "a number of her subscribers would dislike an article on this subject in the trade magazine of the Asbestos Industry," Brown expressed the view that as a result of his communications with Miss Rossiter, "I am inclined to believe she will omit any review of the book in question."

Finally, plaintiffs' attorney read into evidence excerpts of the deposition testimony of Kenneth W. Smith, a physician who started to work for Johns-Manville in 1944 and eventually became Medical Director of its Canadian corporation. Dr. Smith testified that from the beginning of his employment he saw persons with asbestosis "on a regular and frequent basis" and frequently made recommendations that such employees receive job reclassifications which would remove them from continued exposure to asbestos dust. [193 *N.J.Super.* at 117-20.]

The court below held that in respect of the punitive damages claim, the proofs recited above fully supported plaintiffs' factual contentions and the jury's acceptance of them. 193 *N.J.Super.* at 117. On this appeal Johns-Manville's position, succinctly stated, is that the punitive damages award against it is legally impermissible, ill-advised as a matter of public policy in litigation of this nature, and factually unwarranted.

II

The "legally impermissible" argument rests on an asserted theoretical inconsistency between strict liability and punitive damages, which would preclude punitive damage claims when liability for compensatory damages is founded on strict products liability doctrine, if not in all situations at least in asbestos, strict liability lawsuits. We hold that there is no *per se* legal bar to pursuing a strict liability, failure-to-warn claim and a punitive damage claim in the same case. For this purpose there is no reason to distinguish asbestos litigation from other strict prod-

ucts liability actions. A brief examination of the development and purposes of strict products liability and punitive damages may illuminate the nature of their differences and clarify our holding that those differ**[471]**ences do not create a bar to an award of punitive damages in a failure-to-warn, strict products liability case.

We trace current notions of strict products liability both to principles of warranty, a "freak hybrid born of the illicit intercourse of tort and contract," Prosser, "The Assault Upon The Citadel," 69 *Yale L.J.* 1099, 1126 (1960), and to tort strict-liability theory, found primarily in cases involving trespass or nuisance. For personal injuries arising from a breach of warranty, "strict liability is imposed upon the maker or seller of the product. Recovery of damages does not depend upon proof of negligence or knowledge of the defect." *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 372 (1960). For its part, strict liability in tort rests on the notion that certain activities that create danger must, regardless of their reasonableness, "pay [their] own way in the event [they] actually cause[ ] damage[ ] to others." *Berg v. Reaction Motors Div.*, 37 *N.J.* 396, 410 (1962).

From these beginnings there evolved the doctrine of strict products liability as we know it today. The doctrine of strict liability in tort imposes liability for injury to another's person or property without any consideration of the defendant's intent to commit the act or cause the injury, or of his moral blameworthiness. Although strict liability in tort has sometimes been referred to as "liability without fault," the expression "liability without moral blame" is more accurate. The "moral blame" connotation given to fault in the criminal law has little application in the law of torts. "There is a broader sense in which 'fault' means nothing more than a departure from a standard of conduct required of a person by society for the protection of his neighbors." W. Prosser and W. Keeton, *The Law of Torts* 535 (5th ed. 1984), *quoted in Suter v. San Angelo Foundry & Mach. Co.*, 81 *N.J.* 150, 162 (1979).

> [The] contention that liability in strict tort precludes consideration of a defendant manufacturer's fault is highly

> dubious. In fact, rather than dispensing with the notion of fault from products liability law, strict tort theory expands it by extending the legal consequences of fault to the "innocent" manufacture of defective products in a manner analogous to negligence per se.
>
> [Owen, "Punitive Damages in Products Liability Litigation," 74 *Mich.L.Rev.* 1257, 1269 (1976) (footnotes omitted) (hereinafter *Owen I*).]

We have previously held that a defendant found liable under strict products liability theory will be considered at fault for purposes of applying the Joint Tortfeasors Contribution Law, *N.J.S.A.* 2A:53A-1 to -5. *Suter*, *supra*, 81 *N.J.* at 162-63; *see also Cartel Capital Corp. v. Fireco of New Jersey*, 81 *N.J.* 548, 566-67, 570 (1980) (total relevant fault was that of two defendants, one liable for production and distribution of a defective product, one liable for its negligent servicing of the product and its role in the chain of distribution).

Although the emphasis in strict products liability cases is on the safety of the product rather than on the manufacturer's conduct, *e.g.*, *Feldman v. Lederle Labs.*, 97 *N.J.* 429, 450 (1984), when, as here, the defect in the product consists of a failure to warn (specifically, defendant's failure to warn plaintiff James Fischer of the dangers in working with the asbestos ore and fiber that Johns-Manville supplied to Fischer's employer), "reasonableness of the defendant's conduct is a factor in determining liability." *Id.* at 451. But the appraisal of that reasonableness is made, in a failure-to-warn case, on the basis of a hypothetical element, an assumed fact. As *Feldman* explains,

> [t]he question in strict liability design-defect and warning cases is whether, *assuming that the manufacturer knew of the defect in the product*, he acted in a reasonably prudent manner in marketing the product or in providing the warnings given. Thus, *once the defendant's* **[472]** *knowledge of the defect is imputed*, strict liability analysis becomes almost identical to negligence analysis in its focus on the rea-

> sonableness of the defendant's conduct. [97 *N.J.* at 450 (emphasis added).]

The quoted passage both demonstrates the limited extent to which negligence analysis creeps into our failure-to-warn, strict products liability law, and illuminates the contrasting approaches of strict liability and negligence theories. As trenchantly observed in *Freund v. Cellofilm Properties, Inc.*, 87 *N.J.* 229 (1981), in the course of Justice Handler's exegesis on the difference between the two approaches, "under strict liability, the seller's knowledge [of the product's propensity to inure as it did] is presumed * * *. In negligence cases, such knowledge must be proved; the standard is what the manufacturer 'knew or should have known.' " *Id.* at 239 (quoting *Phillips v. Kimwood Mach. Co.*, 269 *Or.* 485, 525 *P.* 2d 1033 (1974)). *See also O'Brien v. Muskin Corp.*, 94 *N.J.* 169, 181-84 (1983) (risk-utility analysis to evaluate product's safety is sometimes phrased to inquire whether reasonable manufacturer, fully aware of dangers posed by product, would have manufactured and marketed it as he did).

As is obvious from the foregoing, although juries are asked in failure-to-warn cases to assess the reasonableness of a defendant's conduct, to prove a *prima facie* case of strict products liability a plaintiff need not introduce evidence relating to a manufacturer's or distributor's conduct, except to establish that the defendant did in fact put the offending article into the stream of commerce. This is in contrast to the quality of proofs required to establish a claim for punitive damages, in which a great deal must be shown about a defendant's conduct. "Punitive or exemplary damages are sums awarded apart from compensatory damages and are assessed when the wrongdoer's conduct is especially egregious." *Leimgruber v. Claridge Assocs., Ltd.*, 73 *N.J.* 450, 454 (1977); *see also Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 *N.J.* 37, 48 (1984) (quoting *Leimgruber v. Claridge Assocs., supra*); *Restatement (Second) of Torts* § 908(1) (1979) (punitive damages awarded for outrageous conduct).

The type of conduct that will warrant an award of punitive damages has been described in various ways. The conduct must

be "wantonly reckless or malicious. There must be an intentional wrongdoing in the sense of an 'evil-minded act' or an act accompanied by a wanton and willful disregard of the rights of another." *Nappe*, *supra*, 97 *N.J.* at 49 (citations omitted). "[T]he requirement may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." *Berg v. Reaction Motors*, *supra*, 37 *N.J.* at 414. However one describes the conduct that will justify punitive damages, one thing is clear: "The key to the right to punitive damages is the wrongfulness of the intentional act." *Nappe*, *supra*, 97 *N.J.* at 49.

As should now be apparent, the proofs needed to establish a *prima facie* case of failure-to-warn, strict products liability differ markedly from the proofs that will support an award of punitive damages. Despite their differences—one going to the theory of liability, the other bearing on the form and extent of relief—they are not mutually exclusive nor even incompatible. There is no reason they cannot be litigated together. We agree with defendant's premises: strict products liability proofs center on the product; punitive damages proofs center on a defendant's conduct. We reject as wholly unwarranted the conclusion defendant draws—that these differences preclude punitive damages claims in failure-to-warn, strict product liability cases.

Defendant places special reliance on our decision in *Beshada v. Johns-Manville* **[473]** *Prods. Corp.*, 90 *N.J.* 191 (1982). In that strict-liability, failure-to-warn, asbestos case, this Court held that the "state-of-the-art" defense was unavailable to the defendants. That defense would permit a defendant to demonstrate that given the scientific, technological, and other information available at the time of manufacture or distribution, it could not have known of the dangers of the product. *Feldman v. Lederle Labs.*, *supra*, 97 *N.J.* at 452. Thus the effect of the "state-of-the-art" defense is to permit a defendant to rebut the presumption of knowledge of its product's harmful propensities, not by showing merely its own lack of knowledge but rather by proving the impossibility of knowledge, even by experts in the field. *Ibid.*

Under the holding of *Beshada* a defendant is precluded and a plaintiff is relieved, on the liability aspect of an asbestos, strict-liability, failure-to-warn case, from introducing evidence relating to a defendant's actual knowledge or the state of knowledge in the asbestos field at the time of distribution. That principle, however, does not render the evidence inadmissible for *all* purposes. Hence we hold that in a strict-liability, failure-to-warn case involving exposure to asbestos or asbestos products, plaintiffs are not precluded from introducing evidence relating to defendants' knowledge or conduct as it may be relevant to other aspects of the case, including punitive damages.

In addition to these evidential differences, strict products liability and punitive damages are different in purpose and in the policies each seeks to promote. "All civil doctrines are shaped with a view toward setting and enforcing rules of behavior. * * * [C]ivil law has both 'reparative' [providing money substitutes for losses] and 'admonitory' [discouraging repetition of wrongful conduct and warning others who are inclined to engage in similar conduct] functions." Mallor and Roberts, "Punitive Damages: Toward a Principled Approach," 31 *Hastings L.J.* 639, 645, 647 & n. 56 (1980) (hereinafter Mallor and Roberts).

The overriding goal of strict products liability is to protect consumers and promote product safety. Manufacturers, by the act of marketing their products, are made responsible to the public for injuries caused by those products—the "reparative" function. *See O'Brien v. Muskin Corp.*, *supra*, 94 *N.J.* at 180. Economic policies underlie the legal theory. Manufacturers are usually the "cheapest cost-avoiders," *Suter v. San Angelo Foundry & Mach. Co.*, *supra*, 81 *N.J.* at 173-74, and have the ability to spread the cost of losses caused by dangerous products. It is in furtherance of these policies that plaintiffs' burdens have been reduced. Plaintiffs are relieved, in strict products liability cases, of the burden of establishing defendants' negligence and knowledge or awareness of dangers.

Punitive damages, on the other hand, serve to express the community's disapproval of outrageous conduct—the "admonitory" function. Punitive damages are determined "from

the perspective of the defendant rather than of the plaintiff." *Cappiello v. Ragen Precision Indus., Inc.*, 192 *N.J.Super.* 523, 532 (App.Div.1984) (quoting *Bartolo v. Boardwalk Regency Hotel Casino Inc.*, 185 *N.J.Super.* 540, 544 (Law Div. (1982)). They have been described as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine." *Cabakov v. Thatcher*, 37 *N.J.Super.* 249, 259 (App.Div.1955) (quoting *Haines v. Schultz*, 50 *N.J.L.* 481, 484 (Sup.Ct.1888)). They are awarded to punish the wrongdoer, and to deter both the wrongdoer and others from similar conduct in the future. *E.g., Nappe, supra*, 97 *N.J.* at 48-49; *Leimgruber v. Claridge Assocs., supra*, 73 *N.J.* at 454. "The doctrine of punitive damages survives because it continues to serve the useful purposes of expressing society's disapproval of intolerable conduct and deterring such conduct where no other **[474]** remedy would suffice." Mallor and Roberts, *supra*, 31 *Hastings L.J.* at 641.

As with the differing proofs required for strict liability and punitive damages, the policies behind them, although differing from one another, are not incompatible. We disagree with Justice O'Hern's assertion "that there is a strong doctrinal inconsistency in permitting a punitive damages claim in an action based on strict products liability." *Post* at 677. In fact, in products liability cases we believe punitive damages can complement strict liability. One court has defined punitive damages as a "sword" to be used with the "shield" of compensation provided by strict liability. *Thiry v. Armstrong World Indus.*, 661 *P.*2d 515, 517 (Okla.1983). In some cases punitive damages will provide the incentive necessary to encourage plaintiffs to pursue a manufacturer who engages in a "deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences," *Berg, supra*, 37 *N.J.* at 414, when the compensatory award for those harmful consequences would be outweighed by prohibitive costs of litigation. *See also* W. Prosser and W. Keeton, *Law of Torts, supra*, § 2 at 12 (punitive damages can remedy denial of compensation for actual expenses of litigation and serve as an incentive to seek redress for "a long array of petty cases of outrage and oppression").

Additional support for allowing punitive damages in strict products liability actions may be found in the availability of alternative theories of liability in products cases. Plaintiffs may pursue products claims not only under principles of strict liability but also under theories of negligence or intentional tort. No one would argue that in either of the latter instances a plaintiff would be barred from seeking punitive damages. Hence to allow punitive damages in products cases based on these theories but disallow them under strict liability would create an unnecessary and unwelcome anomaly in our law. The right to recover punitive damages cannot sensibly, in this day and age, be made to turn on the form of pleading—a truism recognized by our learned judicial colleagues on the federal trial bench in New Jersey, albeit later by some than by others. *Compare Gold v. Johns-Manville Sales Corp.*, 553 *F.Supp.* 482 (D.N.J.1982) (punitive damages not allowed in a products liability action resting on failure-to-warn, strict products liability, but allowed on negligence counts in same cases), *and Wolf by Wolf v. Proctor & Gamble Co.*, 555 *F.Supp.* 613 (D.N.J.1982) (punitive damages allowed only on negligence and intentional misrepresentation claims), *with Gogol v. Johns-Manville Sales Corp.*, 595 *F.Supp.* 971 (D.N.J.1984) (New Jersey law does not preclude plaintiffs from seeking punitive damages in failure-to-warn, strict products liability cases), *and Cinnaminson Township Bd. of Educ. v. U.S. Gypsum*, 552 *F.Supp.* 855 (D.N.J.1982) (New Jersey law clearly allows recovery of punitive damages in strict products liability cases). Nor will we dictate trial tactics for the plaintiffs' bar. A plaintiff who succeeds in proving the willful, egregious conduct that will support punitive damages is one who surely could have proved negligent, or intentional, tortious conduct. A decision to rely only on strict liability to establish liability of a defendant is a matter of strategy well within the discretion of counsel.

Defendant argues that allowing proofs of a defendant's misconduct in a strict liability case invites the risk of confusing juries. Presumably the fear is that jurors will be unable in their evaluation of the strict liability claim to disregard whatever evidence there may be of defendant's misconduct, and hence will

be unable to return a fair verdict. The fear is unfounded. Our faith in the jury system is greater than the argument suggests. Juries are often called on to consider alternative theories and to conduct deliberations in stages, as when given interrogatories or a special verdict sheet. See *Rule* 4:39-2, *Rule* 4:39-1. We are confident that a careful charge, clearly explaining the elements necessary **[475]** for each finding, can assist juries in reaching fair verdicts on both the liability phase and, should they reach the question, punitive damages in a failure-to-warn, strict products liability case.

Finally, we note that today's decision puts New Jersey in line with the many other jurisdictions that have considered the "incompatibility" of strict liability and punitive damages: they are virtually unanimous in finding them compatible. We supplement the impressive list of authorities marshalled by Judge Pressler in 193 *N.J.Super.* at 122-23 with the following: *Jackson v. Johns-Manville Sales Corp.*, 781 *F.*2d 394 (5th Cir.), *cert.* denied, ____ *U.S.* ____, 106 *S.Ct.* 3339, 90 *L.Ed.*2d ____ (1986) (Mississippi law); *Cathey v. Johns-Manville Sales Corp.*, 776 *F.*2d 1565 (6th Cir. 1985) *cert.* denied, ____ *U.S.* ____, 106 *S.Ct.* 3335, 90 *L.Ed.*2d ____ (1986) (Tennessee law); *Hale v. Firestone Tire & Rubber Co.*, 756 *F.*2d 1322 (8th Cir.1985) (Missouri law); *Hansen v. Johns-Manville Prods. Corp.*, 734 *F.*2d 1036 (5th Cir.1984), *cert.* denied, ____ *U.S.* ____, 105 *S.Ct.* 1749, 84 *L.Ed.*2d 814 (1985) (Texas law); *Palmer v. A.H. Robins Co.*, 684 *P.*2d 187 (Colo.1984); *Johns-Manville Sales Corp. v. Janssens*, 463 *So.*2d 242 (Fla.Dist.Ct.App.1984), review denied, 467 *So.*2d 999 (Fla.1985); *United School Dist. No. 490 v. Celotex Corp.*, 6 *Kan.App.*2d 346, 629 *P.*2d 196 (1981); *cf. Robinson v. Audi NSU Auto Union Aktiengesellschaft*, 739 *F.*2d 1481 (10th Cir.1984) (Oklahoma law) (in strict products liability suit proof of actual damages is prerequisite to punitive damages).

III

Having determined that no theory of law forecloses the award of punitive damages in a failure-to-warn, strict products liability action, we turn to the policy concerns that defendant

poses as obstacles to our decision. Our discussion applies to asbestos mass-tort litigation, inasmuch as it is in that context that defendant chooses to present the issue.

One characteristic of this kind of litigation is that it occurs years after the exposure to asbestos, and hence long after the underlying tortious conduct that creates liability. Asbestos-related diseases generally have long latency periods. For example, asbestosis manifests itself ten to forty years after exposure, and pulmonary and bronchogenic carcinoma (lung cancer) typically occurs fifteen to thirty-five after exposure.[2]

The remoteness of the tortious conduct spawns arguments that it would be inequitable to impose punitive damages in litigation that does not take place until years after the offending event. One such argument posits that changing social values render punishable conduct that would never have been punished at the time it occurred. Professor David Owen cautions against overlooking the prevailing moral and business standards of the time involved. Owen, "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 *U.Chi.L.Rev.* 1, 13-14 (1982) (*Owen II*). In an earlier article Professor Owen grouped "manufacturer misconduct" into five categories: (1) fraudulent-type, affirmative conduct designed to mislead the public, (2) knowing violations of safety standards, (3) inadequate testing and quality-control, manufacturing procedures, (4) failure to warn of known dangers, and (5) post-marketing failures to remedy known dangers. *Owen I*, *supra*, 74 *Mich.L.Rev.* at 1329-61.

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2 Asbestosis is a progressive and incurable disease in which a scarring process initiated by the inhalation of asbestos fibers destroys air sacs in healthy lung tissue, causing a decrease in pulmonary function and lung volume. Lung cancer caused by asbestos occurs in the lower lobes of the lungs and is, like asbestosis, incurable. Mesothelioma, another of the most common asbestos-related disabilities, is a malignant tumor of the membrane lining the lungs and the chest and abdominal cavities. It also is a latent disease, and is invariably fatal. Special Project, "An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation," 36 *Vand.L.Rev.* 573, 579 & nn. 10-12 (1983).

[476] We do not perceive that any "changing social values" are implicated in this case, which we view as falling within Professor Owen's categories one and four. Punitive damages were available in this state well before James Fischer was exposed to asbestos. *See, e.g., Allen v. Craig*, 13 *N.J.L.* 294 (Sup.Ct. 1833). We cannot imagine that the conduct proven in this case would have been viewed as any less egregious in the 1940's, when the exposure commenced, than it is today. In this connection we share the Appellate Division's reaction to defendant's "knowingly and deliberately * * * subjecting [James Fischer] as an asbestos worker to serious health hazards with utter and reckless disregard of his safety and well-being." 193 *N.J.Super.* at 131.

> It is indeed appalling to us that Johns-Manville had so much information on the hazards to asbestos workers as early as the mid-1930's and that it not only failed to use that information to protect these workers but, more egregiously, that it also attempted to withhold this information from the public. It is also clear that even though Johns-Manville may have taken some remedial steps decades ago to protect its own employees, it apparently did nothing to warn and protect those who, like plaintiff, were employed by Johns Manville customers engaged in the manufacture and fabrication of asbestos products. [*Ibid.*]

Another concern created by the time gap between exposure and litigation is that the corporate personnel who made the decisions at the time of the exposure are no longer with the defendant company, possibly no longer alive. From this fact it is argued that punitive damages are inappropriate because they will not punish the true wrongdoers. But as many courts have observed, this contention ignores the nature of a corporation as a separate legal entity. See, *e.g., Johns-Manville Sales Corp. v. Janssens*, *supra*, 463 *So.*2d at 252; *Gogol v. Johns-Manville Sales Corp.*, *supra*, 595 *F.Supp.* 971. Although the responsible management personnel may escape punishment, the corporation itself will not. "It is agency at the time of the tortious act, not at the time of litigation, that determines the corporation's

liability." *Moran v. Johns-Manville Sales Corp.*, 691 *F.*2d 811, 817 (6th Cir.1982). We are reminded that a primary goal of punitive damages is general deterrence—that is, the deterrence of others from engaging in similar conduct. *See* Mallor and Roberts, *supra*, 31 *Hastings L.J.* at 648-49. That purpose is, of course, well served regardless of changes in personnel within the offending corporation.

A related argument, which similarly ignores the legal nature of corporations, is that punitive damages unfairly punish innocent shareholders. This argument has been rejected repeatedly. *E.g.*, *Wangen v. Ford Motor Co.*, 97 *Wis.*2d 260, 289, 294 *N.W.*2d 437, 453 (1980); *Martin v. Johns-Manville Sales Corp.*, 322 *Pa.Super.* 348, 365-69, 469 *A.*2d 655, 664-65 (1983), rev'd on other grounds, 508 *Pa.* 154, 494 *A.*2d 1088 (1985). It is the corporation, not the individual shareholders, that is recognized as an ongoing legal entity engaged in manufacturing and distributing products. True, payment of punitive damages claims will deplete corporate assets, which will possibly produce a reduction in net worth and thereby result in a reduction in the value of individual shares. But the same is true of compensatory damages. Both are possible legal consequences of the commission of harmful acts in the course of doing business. To the same extent that damages claims may affect shareholders adversely, so do profitable sales of harmful products redound to their benefit (at least temporarily). These are the risks and rewards that await investors. Also, we would not consider it harmful were shareholders to be encouraged by decisions such as this to give close scrutiny to corporate practices in making investment decisions.[3]

[477] Another characteristic of asbestos litigation is found in the startling numbers that reflect the massive amount of litigation generated by exposure to asbestos. Although we are mindful of the fact that the case before us involves one worker, whose exposure to asbestos caused legally compensable injury

3 The expectation is not unrealistic. Although it surely is not the province of this opinion to express any view on the merits of the phenomenon, we note the wide-scale withdrawal of invested funds from companies doing business in South Africa—an expression of public reaction to apartheid.

to him and his wife—it is not a class action, not a "mass" case—nevertheless we would be remiss were we to ignore the society-wide nature of the asbestos problem. Recognizing the mass-tort nature of asbestos litigation, we address the concern that that characteristic of the litigation brings to a decision to allow punitive damages.

Studies show that between eleven million and thirteen million workers have been exposed to asbestos. Special Project, "An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation," 36 *Vand.L.Rev.* 573, 580 (1983). More than 30,000 lawsuits have been filed already for damages caused by that exposure, with no indication that there are no more victims who will seek redress. Of the multitude of lawsuits that are faced by asbestos defendants as a group, Johns-Manville alone has been named in more than 11,000 cases. New claims are stayed because Johns-Manville is attempting reorganization under bankruptcy law. *In re Johns-Manville Corp.*, 26 *B.R.* 420 (Bankr.S.D.N.Y. 1983).

Defendant argues that the amount of compensatory damages assessed and to be assessed is so great that it will effectively serve the functions of punitive damages—that is, defendants are more than sufficiently punished and deterred. We are not at all satisfied, however, that compensatory damages effectively serve the same functions as punitive damages, even when they amount to staggering sums. Compensatory damages are often foreseeable as to amount, within certain limits difficult to reduce to a formula but nonetheless familiar to the liability insurance industry. Anticipation of these damages will allow potential defendants, aware of dangers of a product, to factor those anticipated damages into a cost-benefit analysis and to decide whether to market a particular product. The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition.

Without punitive damages a manufacturer who is aware of a dangerous feature of its product but nevertheless knowingly chooses to market it in that condition, willfully concealing from the public information regarding the dangers of the product,

would be far better off than an innocent manufacturer who markets a product later discovered to be dangerous—this, because both will be subjected to the same compensatory damages, but the innocent manufacturer, unable to anticipate those damages, will not have incorporated the cost of those damages into the cost of the product. All else being equal, the law should not place the innocent manufacturer in a worse position than that of a knowing wrongdoer. Punitive damages tend to meet this need.[4]

Defendant argues further that the cumulative effect of punitive damages in mass-tort litigation is "potentially catastrophic." The Johns-Manville bankruptcy is offered as proof of this effect. We fail to see the distinction, in the case of Johns-Manville, between the effect of compensatory damages and that of punitive damages. The amount of punitive damages and the determination that they would cause insolvency that could be avoided in their absence are so speculative as to foreclose any sound basis for judicial decision. *See also Jack*[478]*son v. Johns-Manville, supra*, 781 *F.*2d at 403 n. 11 ("defendants * * * do not indicate why their ability to pay future damage awards will be more affected by punitive damage awards than by the multiplicity of compensatory damage awards.").

Heretofore the typical setting for punitive damage claims has been the two-party lawsuit in which, more often than not, a punitive damages award was supported by a showing of some element of malice or intentional wrongdoing, directed by a defendant to the specific plaintiff. Even if the actual object of the malicious conduct was unknown to defendant, the conduct nevertheless was directed at a single person or a very limited group of potential plaintiffs.

Punishable conduct in a products liability action, on the other hand, will often affect countless potential plaintiffs whose identities are unknown to defendant at the time of the culpable conduct. We agree with the Illinois court that the mere

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4 In addition, it is questionable how much punishment is effected by compensatory damages alone, which are generally covered by liability insurance. We consider our observation in that regard to be valid despite a restricted insurance market and increasing insurance costs.

fact that a defendant, "through outrageous misconduct, * * * manage[s] to seriously injure a large number of persons" should not relieve it of liability for punitive damages. *Froud v. Celotex Corp.*, 107 *Ill.App.*3d 654, 658, 63 *Ill.Dec.* 261, 264, 437 *N.E.*2d 910, 913 (1982), rev'd on other grounds, 98 *Ill.*2d 324, 74 *Ill.Dec.* 629, 456 *N.E.*2d 131 (1983).

Of greater concern to us is the possibility that asbestos defendants' assets may become so depleted by early awards that the defendants will no longer be in existence and able to pay compensatory damages to later plaintiffs. Again, it is difficult if not impossible to ascertain the additional impact of punitive damages as compared to the impact of mass compensatory damages alone.

Many of the policy arguments against punitive damages in mass tort litigation cases can be traced to *Roginsky v. Richardson-Merrell, Inc.*, 378 *F.*2d 832 (2d Cir.1967). The *Roginsky* court denied punitive damages to a plaintiff who suffered cataracts caused by MER/29, an anti-cholesterol drug. Although the denial of punitive damages rested on a determination that the evidence was insufficient to send the matter to the jury, the court expressed several concerns over allowing punitive damages for injuries to multiple plaintiffs. The fear that punitive damages would lead to "overkill" turned out to be unfounded in the MER/29 litigation. Approximately 1500 claims were made, of which only eleven were tried to a jury verdict. Punitive damages were awarded in only three of those cases, one of which was reversed on appeal. (*Roginsky*, *supra*, 378 *F.*2d 832.) *Owen I*, *supra*, 74 *Mich.L.Rev.* at 1324, 1330 n. 339. While we do not discount entirely the possibility of punitive damage "overkill" in asbestos litigation, we do recognize that the vast majority of cases settle without trial.

Accepting the possibility of punitive damage "overkill," we turn to means of addressing that problem. Because the problem is nationwide, several possible remedial steps can be effective only on a nationwide basis, and hence are beyond our reach. One such solution is the setting of a cap on total punitive damages against each defendant. *E.g.*, *Owen II*, 49 *U.Chi.L.Rev.* at 48-49 & n. 227. Such a cap would be ineffective unless applied

uniformly. To adopt such a cap in New Jersey would be to deprive our citizens of punitive damages without the concomitant benefit of assuring the availability of compensatory damages for later plaintiffs. This we decline to do.

Perhaps the most likely solution to the problem of cumulative punitive damages lies in the use of a class action for those damages. *Froud v. Celotex Corp.*, *supra*, 107 *Ill.App.*3d at 657-60, 63 *Ill.Dec.* at 264-65, 437 *N.E.*2d at 913-14. Several courts have recognized the need to streamline and consolidate issues that come up repeatedly in asbestos litigation. For instance, the non-availability of the state-of-the-art defense was decided in a consolidated case governing all asbestos cases in the federal district of New Jersey. *In re Asbestos* **[479]** Litigation, 628 *F.Supp.* 774 (D.N.J.1986). Another federal district court certified a class of all plaintiffs in personal injury asbestos cases pending in the Eastern District of Texas, for purposes of determining both the availability of the state-of-the-art defense and punitive damages. *Jenkins v. Raymark Indus.*, 109 *F.R.D.* 269 (E.D.Tex.1985), aff'd, 782 *F.*2d 468 (5th Cir.1986), reh'g denied, 785 *F.*2d 1034 (5th Cir.1986)

Prerequisites to class certification under Federal Rule of Civil Procedure 23(a) are:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

Additional requirements include a finding that

> the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [*Fed.R.Civ.P.* 23(b)(3).]

A mandatory class may be certified if

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest. [*Fed.R.Civ.P.* 23(b)(1).]

Several courts have recognized the usefulness of class certification in mass tort cases. *E.g., Jenkins v. Raymark Indus., supra*, 109 *F.R.D.* 269; *In re "Agent Orange" Product Liability Litigation*, 100 *F.R.D.* 718 (E.D.N.Y.) certif. den., 100 *F.R.D.* 735 (D.N.Y.1983) (class certified for affirmative defenses and causation issues, mandatory certification on punitive damages). Although some appellate courts have decertified classes in mass products liability actions, those same courts have nonetheless recognized the validity of the class action mechanism. The federal district court for the Eastern District of Pennsylvania certified a nationwide class of plaintiff school authorities in asbestos property damage cases. *In re Asbestos School Litigation*, 104 *F.R.D.* 422 (1984), rev'd, 789 *F.*2d 996 (3d Cir.1986). The class was mandatory for punitive damages and "opt-out" for compensatory damages. The Third Circuit acknowledged the possibility that the concerns generated by mass tort cases might justify certification of a mandatory nationwide class for purposes of punitive damages. 789 *F.*2d at 1005. The class was decertified, however, because certification rested on insufficient factual findings and the class was underinclusive, affecting neither personal injury claimants nor non-school property damage plaintiffs. 789 *F.*2d at 998, 1005-06. See also *In re Northern District of California, Dalkon Shield IUD Prods. Liability Litigation*, 693 *F.*2d 847 (9th Cir.1982), *cert.* denied, 459 *U.S.*

1171, 103 *S.Ct.* 817, 74 *L.Ed.*2d 1015 (1983) (hereinafter *Dalkon Shield*) (nationwide class decertified because requirements of "typicality" and superiority of class action over individual adjudication not met). For a thoughtful analysis of the advantages and problems of resolving mass tort punitive damage claims through the class-action technique, see Seltzer, "Punitive Damages in Mass Tort Litigation," 52 *Fordham L.Rev.* 37, 61-92 (1983).

Defendants as well as plaintiffs can seek class certification. *See Dalkon Shield*, *supra*, 693 *F.*2d at 849 n. 2. In addition, the asbestos industry itself is free to—and has begun to—develop alternatives and supplements to federal class action. A step in this direction is the establishment of the **[480]** Asbestos Claims Facility pursuant to the Wellington Agreement, an organization whose purpose is to establish expeditious and uniform settlement, payment, or defense of asbestos-related claims.[5]

At the state court level we are powerless to implement solutions to the nationwide problems created by asbestos exposure and litigation arising from that exposure. That does not mean, however, that we cannot institute some controls over runaway punitive damages. When a defendant manufacturer engages in conduct warranting the imposition of punitive damages, the harm caused may run to countless plaintiffs. Each individual plaintiff can fairly charge that the manufacturer's conduct was egregious as to him and that punitive damages should be assessed in his lawsuit. "Each tort committed by the defendant is individual and peculiar to that particular plaintiff who has brought suit." *Neal v. Carey Canadian Mines*, 548 *F.Supp.* 357, 377 (E.D.Pa.1982), aff'd *sub nom. Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 *F.*2d 481 (3d Cir.1985). Nonetheless, there should be some limits placed on the total punishment exacted from a culpable defendant. We conclude that a reasonable imposition of those limits would permit a defendant to in-

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5 It is also possible that the needs of future plaintiffs will be attended to, as to defendants in bankruptcy, by innovative procedures in the federal Bankrutpcy Courts, such as reduced priority for punitive damages claims as a condition of a reorganization plan.

troduce evidence of other punitive damage awards already assessed against and paid by it, as well as evidence of its own financial status and the effect a punitive award would have. We note with approval that this approach has already been looked on with favor by our trial courts. See *Brotherton v. Celotex Corp.*, 202 *N.J.Super.* 148, 163 (Law Div.1985).

We realize that defendants may be reluctant to alert juries to the fact that other courts or juries have assessed punitive damages for conduct similar to that being considered by the jury in a given case. Although the evidence may convince a jury that a defendant has been sufficiently punished, the same evidence could nudge a jury closer to a determination that punishment is warranted. That is a risk of jury trial. The willingness to accept that risk is a matter of strategy for defendant and its counsel, no different from other strategy choices facing trial lawyers every day.

When evidence of other punitive awards is introduced, trial courts should instruct juries to consider whether the defendant has been sufficiently punished, keeping in mind that punitive damages are meant to punish and deter defendants for the benefit of society, not to compensate individual plaintiffs.

A further protection may be afforded defendants by the judicious exercise of remittitur. Should a trial court determine that an award is "manifestly outrageous" or "grossly excessive," *Cabakov v. Thatcher*, *supra*, 37 *N.J.Super.* at 260, it may reduce that award or order a new trial on punitive damages. In evaluating the excessiveness of challenged punitive damage awards, trial courts are expressly authorized to consider prior punitive damage awards.

IV

Defendant argues that even if punitive damages are allowed in strict products liability, mass tort actions, they should not have been assessed against Johns-Manville in this action. We disagree.

We hold that punitive damages are available in failure-to-warn, strict products liability actions when a manufacturer is (1) aware of or culpably indifferent to an unnecessary risk of in-

jury, and (2) refuses to take steps to reduce that danger to an acceptable level. This standard can be met by a showing of "a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences." *Berg v. Reaction Motors*, *supra*, 37 *N.J.* at 414. **[481]** Judge Brody's charge at the trial level incorporated the elements necessary to satisfy this standard. The trial court described the conduct necessary to warrant the imposition of punitive damages as "intentionally inflicting harm or acting in such a gross, wanton way, such a terrible way, so recklessly in disregard of what might happen to someone * * * ." This language amply conveyed the requisite level of conduct, and, for purposes of this case, may be deemed the equivalent of the *Berg* case's formulation, adopted above.

Judge Brody alerted the jury, at the very outset of the charge, that plaintiffs' claims for punitive damages "involve considerations which in some respects are quite different from your concern with respect to compensatory damages." This careful approach was adhered to throughout the charge. The court informed the jury of the purposes of compensatory damages and admonished the jurors not to use punitive damages to compensate the plaintiffs. It reminded the jury on more than one occasion not to consider defendant's conduct for purposes of assessing compensatory damages. The charge was more than sufficient to protect the legitimate interests of the defendant.

We have set forth in considerable detail the evidence presented to the jury in support of the punitive damages claim, *supra* at 648-651. The voluminous exhibits, answers to requests for admissions, answers to interrogatories, correspondence, and testimony on oral depositions fully justify the Appellate Division's appraisal of the "proofs respecting Johns-Manville" as "indeed [ ] overwhelming." 193 *N.J.Super.* at 117. We are satisfied that a jury could reasonably have concluded that defendant was guilty of deliberate acts or omissions "with knowledge of a high degree of probability of harm and reckless indifference to the consequences." *Berg v. Reaction Motors*, *supra*, 37 *N.J.* at 414. In particular, the evidence supports a finding that Johns-Manville knew of the dangers created by its product. Not

only did it fail to warn users of the serious health hazards associated with exposure to asbestos, it actually took affirmative steps to conceal this information from the public. These actions fully warranted the jury's imposition of punitive damages.

V

Even though defendant challenged neither the trial court's charge to the jury nor the amount of punitive damages awarded in this case, we consider those issues of sufficient importance to warrant the following comments as a guide in future cases.

Because product safety is the paramount concern of products liability law, it is indifference to or disregard of the dangers posed by the product in its defective state that should be the key factor in justifying an award of punitive damages in a failure-to-warn, strict products liability action. When punitive damages are sought as part of a failure-to-warn claim, the court must be especially cautious in instructing the jury regarding the elements that define each and the evidence that may be considered in support of, on the one hand, strict products liability and, on the other, the damages that that inability can support by way of punishment of the defendant manufacturer or distributor of the defective product. The jury must not be misled into believing that the distinct elements of either are a requirement of or necessarily relevant to the other.

The purpose and nature of punitive damages must be carefully explained to the jury. In determining whether a defendant's conduct was sufficiently egregious to justify punitive damages, fact-finders should consider the seriousness of the hazard to the public; the degree of the defendant's awareness of the hazard and of its excessiveness; the cost of correcting or reducing the risk; the duration of both the improper marketing behavior and its cover-up; the attitude and conduct of the enter-**[482]**prise upon discovery of the misconduct; and the defendant's reasons for failing to act. See *Owen I*, *supra*, 74 *Mich.L.Rev.* at ____; *Thiry v. Armstrong*, *supra*, 61 *P.*2d at 519; *Gryc v. Dayton-Hudson*, 297 *N.W.*2d 727, 739 (Minn.), *cert.* denied, 449 *U.S.* 921, 101 *S.Ct.* 320, 66 *L.Ed.*2d 149 (1980).

If a fact-finder decides to award punitive damages, additional considerations can guide a determination of the appropriate amount. Punitive damages should bear some reasonable relationship to actual injury, but we have consistently declined to require a set numerical ration between punitive and compensatory damages. *Nappe*, *supra*, 97 *N.J.* at 50; *Leimgruber*, *supra*, 73 *N.J.* at 457-58. The reasonableness of the relationship of punitive damages to actual injury must be considered in light of other factors in each case. For example, some particularly egregious conduct may generate only minimal compensatory damages. In such cases higher punitive damages would be justified than when substantial compensatory damages are awarded. The profitability of the marketing misconduct, where it can be determined, is relevant. Other factors to be considered include the amount of the plaintiff's litigation expenses, the financial condition of the enterprise and the probable effect thereon of a particular judgment, and the total punishment the enterprise will probably receive from other sources.

Finally, there looms the question of the quality of proof required to sustain a punitive damages award. Our dissenting colleagues urge adoption of a "clear and convincing" standard to replace New Jersey's traditional "preponderance of the evidence" rule. The dissent makes a persuasive argument to support such a change and has cited policy considerations that deserve careful consideration.

However, the fact remains that the parties have not briefed or argued that issue, nor have the courts below addressed it. So significant a shift in our law should come, if at all, only after it has been fully litigated. Under the circumstance we are content to leave for another day the definitive resolution of so portentous a question.

Judgment affirmed.

O'HERN, J., *dissenting*.

But for its decision not to have the jury in this case consider the punitive damages claims in light of the principles it suggest today, I would join the opinion of the Court. With the exception that I believe that the jury should be clearly convinced that the proofs measure up to the standard, I find myself in basic accord with the Court's emphasis on the need to instruct juries on the purposes of punitive damages, the consideration of proportion in an award, the nature of conduct to be sanctioned, and the effect of prior awards in their deliberations. I also agree with the Court's recognition of the importance of possible class disposition. I am also in accord with the Court's view that the manufacturer's conduct here would meet its test of " 'utter and reckless disregard of [the user's] safety and well-being,' " *ante* at 661 (quoting 193 *N.J.Super.* 113, 131 (App.Div.1984)), or my own view of the test as involving "a conscious and outrageous indifference to the risks of marketing, manufacturing, or producing its product." *infra* at 679. I find in the conduct a conscious indifference to the worker's well-being.

Still, whatever may be our views of the conduct involved, the parties should have the issues resolved in accordance with principles of broad application. Hence I choose to express my modest disagreement with the comprehensive and instructive guidance provided in the majority opinion, which guidance will, in itself, do much to advance the future resolution of these issues.

On another occasion I have expressed my views about the relationship of punitive damages to modern tort law. *See Nappe v. Anschelewitz, Ansell & Bonello*, 97 *N.J.* 37, 54-64 (1984) **[483]** (O'Hern, J., concurring). I am occasioned to repeat many of those concerns here.

Since an early premise of punitive damages was that "one purpose of large awards was to prevent dueling," Note, *Exemplary Damages in the Law of Torts*, 70 *Harv.L.Rev.* 517, 522 (1957) (footnote omitted), this doctrine bears careful scrutiny. In this context of products liability, I would root an award of punitive damages in its remaining valid purpose: respecting and

insuring the dignity of the individual. Failure to shape the doctrine to modern tort law has caused it to fall into disrepute and prompted the call for abolition of punitive damages, particularly in the products-liability context.[1] I continue to believe that a correctly structured doctrine of punitive damages can serve the interests of society. I express here the standards and guidelines that I believe necessary to deal effectively with punitive damages in the context of mass-exposure, products-liability litigation. To do so I must first review the purposes of the doctrine and its relation to our doctrine of products liability.

Punitive damages are said to be assessed in addition to compensatory damages to punish a defendant for the commission of an aggravated or outrageous act of misconduct and to deter the defendant and others from such conduct in the future. *See Leingruber v. Claridge Assocs.*, 73 *N.J.* 450, 454 (1977); *see also* Owen, *Punitive Damages in Products Liability Litigation*, 74 *Mich.L.Rev.* 1257, 1277-87 (1976) (examining the functions of punitive damages and their applicability to products-liability litigation). Tort law developed as an adjunct to criminal law; therefore, it was natural to include punishment and deterrence among its objectives. 1 F. Harper & F. James, *The Law of Torts* § 1.3, at 8 (1956). Punitive damages were thus one means

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1 New Jersey Assembly Bill No. 2401, as well as other measures introduced on May 5, 1986, concerns changes in the collateral source rule, punitive damages awards, product liability actions, and joint and several liability. On the federal side, S. 1999, A Bill to Regulate Interstate Commerce by Providing for a Uniform Product Liability Law and For Other Purposes, is in the Senate Committee on Commerce, Science, and Transportation. California's voters have adopted Proposition 51 to curtail punitive-damages claims against municipalities. *See Cal.Civ.Code* §§ 1431, 1431.1-1431.5 (adopted in June 3, 1986, primary election) (cited in *Brown v. Superior Court*, 182 *Cal. App.*3d 1125, 1144 n. 5, 227 *Cal.Rptr.* 768, 780 n. 5 (1986)). Justice Rehnquist has noted that "a significant number of American jurisdictions refuse to condone punitive damages awards." *Smith v. Wade*, 461 *U.S.* 30, 59, 103 *S.Ct.* 1625, 1642, 75 *L.Ed.*2d 632, 653 (1983) (Rehnquist, J., dissenting); *see also Product Liability Act: Hearing Before the Subcommittee on the Consumer of the Committee on Commerce, Science, and Transportation*, 99th Cong., 1st Sess. 27-29 (1985) (availability of punitive damages); *id.* at 94, 103 *S.Ct.* at 1659 (increased difficulty of obtaining punitive damages under S. 100).

by which early society sought to control injurious behavior that grossly violated accepted norms.

Punitive damages were originally associated with dignatory torts and outrageous acts to another's reputation. The case that comes to mind concerning a person's honor is one in which one person physically insults another, but without injury, thereby humiliating the victim. *See Kiser v. Neumann Co. Contractors, Inc.*, 426 *S.W.*2d 935, 938 (Ky.1967). This notion of insult within the primitive doctrine of punitive damages would be expanded well beyond its original purpose and would be largely irrelevant if applied to modern consumer-products-liability law.

As noted, the classic punitive-damages claim arises from a single incident involving two parties, making it possible for a single jury to determine an appropriate punishment without considering the possibility of additional sanctions by other juries. Furthermore, punitive damages have always been appropriately recognized when there was no adequate recovery for a legal wrong. *Huckle v. Money*, 95 *Eng.Rep.* 768 (1763) (exemplary damages appropriate where King's constable wrongfully detained plaintiff). The "sense of outrage and insult" encompassed in injuries inflicting emotional distress has been one of the driving forces in the development of punitive damages awards. *Symposium Discussion—The History of Punitive Damages*, 56 *S.Cal.L.Rev.* 155, 155 (1982). Our **[484]** law may provide recompense for such injury in the form of emotional suffering, provided that there is a sufficient nexus between the actor and the injured individual. *Portee v. Jaffee*, 84 *N.J.* 88, 98-99 (1980). With this as background, we approach the modern mass-exposure, products-liability case.

A. PUNITIVE DAMAGES ARE INAPPROPRIATE IN ORDINARY STRICT PRODUCTS-LIABILITY CASES

The history of punitive damages demonstrates that there is a strong doctrinal inconsistency in permitting a punitive-damages claim in an action based upon strict products liability. *See* Tozer, *Punitive Damages and Products Liability*, 39 *Ins.Couns.J.* 300, 301 (1972). In a long series of cases, summarized in

O'Brien v. Muskin Corp., 94 *N.J.* 169 (1983), this Court outlined its view of the purposes of strict products-liability law. First, the underlying purpose is a shared concern about the proper allocation of the risk of loss upon all parties in the stream of commerce, *id.* at 181-84; second, strict liability is imposed in part to relieve plaintiff's sometimes overwhelming burdens of proof, *id.* at 179; and third, central to our analysis of strict tort liability is the premise that it is the condition of the product that determines liability, not the conduct of the manufacturer, *id.* at 180; *see also Feldman v. Lederle Laboratories*, 97 *N.J.* 429, 450 (1984) ("[E]mphasis of the strict liability doctrine is upon the safety of the product, rather than the reasonableness of the manufacturer's conduct. It is a product-oriented approach to responsibility"). In *Freund v. Cellofilm Properties, Inc.*, 87 *N.J.* 229 (1981), the Court emphasized that even in failure-to-warn cases, the manufacturer's liability is predicated not on the manufacturer's conduct but on the safety of the product:

> [O]nly safe products should be marketed—a safe product being one whose utility outweighs its inherent risk, provided that risk has been reduced to the greatest extent possible consistent with the product's continued utility. [*Id.* at 238 n. 1.]

One of the judicial benefits of strict liability is the simplification of proof in complex tort litigation. *See, e.g., Beshada v. Johns-Manville Prods. Corp.*, 90 *N.J.* 191, 209 (1982) ("salutary goals of [imposing strict liability include] increasing product safety research and simplifying tort trials"). Hence, in the asbestos context a central goal of *Beshada* is undermined if not lost entirely when each trial invites reexamination of what the asbestos industry knew about the product and when, rather than the safety of the product. *See* Brodeur, *Annals of Law—the Asbestos Industry on Trial, The New Yorker* (June 10, 1985-July 1, 1985). As noted, one of our goals in adopting strict liability was to meet the changing needs of society and to "eas[e] the burden of proof for a plaintiff injured by a defective product, a policy that is achieved by eliminating the require-

ment that the plaintiff prove the manufacturer's negligence." *O'Brien v. Muskin Corp., supra*, 94 *N.J.* at 179 (citing Keeton, *Product Liability and the Meaning of Defect*, 5 *St. Mary's L.J.* 30, 34-35 (1973)). In a cause of action based upon a theory of strict liability we focus upon the product itself and not whether defendant "knew or should have known of the harmful attributes of its product while the product was under its control in order to charge it with that knowledge * * *. Once the product is deemed dangerous, the defendant's lack of fault is irrelevant." *Michalko v. Cooke Color & Chem. Corp.*, 91 *N.J.* 386, 394-95 (1982) (citations omitted). Since the conduct of the manufacturer is largely irrelevant, in the ordinary strict liability case punitive damages are inappropriate.

B. PUNITIVE DAMAGES ARE APPROPRIATE IN CERTAIN CASES INVOLVING MASS EXPOSURE TO HIGHLY DANGEROUS SUBSTANCES OR MATERIALS

Notwithstanding that punitive damages are inappropriate in strict products-liability **[485]** cases, there may be cases involving incidents of mass exposure to unsafe products that are so outrageous that they call for a societal imposition of sanctions that do more than just make the victims whole. I would recognize punitive damages in certain circumstances, such as mass-exposure, hazardous-substance cases, where the conduct of the manufacturer constitutes such an outrageous affront to the individual that punishment is necessary. In doing so, the modern use of punitive damages would be conformed to its ancient relationship to dignatory torts.

In so ruling, a court must develop an analytical framework to identify those cases in which the assessment of punitive damages is appropriate and to provide guidance for trial and appellate courts. I would hold that: (1) punitive damages should be based upon a finding that the actions of a manufacturer exhibit a conscious and outrageous indifference to the risk that its product may be excessively dangerous to consumers; (2) the factfinder must base this determination on clear and convincing evidence of such indifference; (3) juries must be carefully in-

structed of the measure of damages with specific standards that should relate to the unconscionable profit realized by the outrageous acts of the manufacturers; and (4) courts should, whenever possible, resolve the common question of liability for punitive damages at an early stage of the litigation as a class action.

(1) *The Standard for Imposition of Punitive Damages*

"The concept of punitive damages embodies a rule for individualized punishment of a wrongdoer whose conduct toward the plaintiff is particularly outrageous." *Collins v. Eli Lilly Co.*, 116 *Wis.*2d 166, 202, 342 *N.W.*2d 37, 54, *cert. denied sub nom. E.R. Squibb & Sons, Inc. v. Collins*, ____ *U.S.* ____, 105 *S.Ct.* 107, 83 *L.Ed.*2d 51 (1984). If the manufacturer displays such a conscious and outrageous indifference to the risks of marketing, manufacturing, or producing its product, then punitive damages should be awarded. This indifference should equate with something more significant than "willful and wanton" conduct, a concept that our law has not sharply defined. *See Krauth v. Israel Geller*, 31 *N.J.* 270, 277 (1960).[2] I recognize that the use of any verbal formula does not convey with unerring accuracy the concept that we wish to impart. To this extent, we are trapped in the language of the law. Commentators have pessimistically characterized such verbal variations as "negligence 'with the addition of a vituperative epithet,' " Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 *S.Cal.R.Rev.* 1, 36 (1982) (quoting *Wilson v. Brett*, 152 *Eng. Rep.* 737, 739 (Ex.Ch.1842)).

Still we must try to give content to the phrase that we choose to impact the degree of failure of conduct that will warrant imposition of the sanction of punitive damages.

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2 In some contexts, we have employed this concept but have sharply limited it to situations in which a jury is dealing with average human behavior and canvassing ordinary conduct that is well within the norm of everyday experience. *Mahoney v. Carus Chem. Co.*, 102 *N.J.* 564 (1986) (firemen's rule); *see also Foldi v. Jeffries*, 93 *N.J.* 533, 549-50 (1983) (parental immunity).

I believe that the phrase conscious indifference to the risks of marketing the product will convey the requirement that the manufacturer was aware of the risk at the time the product was marketed. This concept conveys an indifference to human values that I regard as essential to the imposition of punitive damages. "[T]he thing that outrages the juries in those cases is precisely the notion of the defendant manufacturer supposedly using consumers in the instrumentalist fashion for dollars." *Symposium Discussion, supra*, 56 *S.Cal.L.Rev.* at 158. Such conduct is an insult to the personal well-being of the victim equivalent to that which prompted the early development of the doctrine. Punitive-**[486]**damages awards are acceptable when the indifference and disregard exhibited by the manufacturer, who sees the consumer as a human test laboratory, constitute an affront to the dignity of the individual. *See, e.g., Grimshaw v. Ford Motor Co.*, 119 *Cal.App.*3d 757, 174 *Cal.Rptr.* 348 (1981) ($3,500,000 punitive-damages award, which had been reduced from $125 million, upheld for marketing Ford Pinto with inherently dangerous gas tank when avoidance would have involved minimal costs).

I agree with the majority that in a products-liability action the concept of election of remedies does not preclude the imposition of punitive damages. In such an action, the plaintiff is *relieved* of the *burden* of proving knowledge of the dangerous propensity of the product, *Freund v. Cellofilm Properties, Inc., supra*, 87 *N.J.* at 244, but is not precluded from demonstrating in the risk-utility analysis that the manufacturer made a conscious choice to expose users to an unreasonable risk of harm that could have been avoided or minimized with a slight burden to the utility of the product.

In presenting the differing standards of conduct to a jury a court will confront some difficulties, but such difficulties will not be insurmountable.

(2) *The Quality of Proof Required*

Since awarding punitive damages in a products-liability case has such serious consequences, the burden of proof must reflect the gravity of the decision. Standards of proof are devices of

the law that guarantee that the public will have confidence in the integrity of the decision. *Santosky v. Kramer*, 455 *U.S.* 745, 757, 102 *S.Ct.* 1388, 1396, 71 *L.Ed.*2d 599, 609 (1982). In assessing exemplary damages, common-law juries are asked to fulfill one of the most solemn roles of society, that of punishing its members. "[P]articularly careful scrutiny" is warranted when punitive damages are allowed. *Roginsky v. Richardson-Merrell, Inc.*, 378 *F.*2d 832, 852 (2d Cir.1967). "Three jurisdictions have recently modified their punitive damages laws to provide that punitive damages may be awarded only if the plaintiff has proved by 'clear and convincing evidence' that the defendant acted with the requisite culpability. * * * [Another state] requires that plaintiffs prove their punitive damages claims beyond a reasonable doubt." Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 *Va.L.Rev.* 269, 296-97 (1983) (footnotes omitted). I believe that a party seeking punitive damages in this context should prove the requisite " 'outrageous' conduct by clear and convincing proof." *Acosta v. Honda Motor Co.*, 717 *F.*2d 828, 839 (3d Cir.1983) (interpreting Virgin Islands law in absence of any existing precedent); *accord Wangen v. Ford Motor Co.*, 97 *Wis.*2d 260, 297, 294 *N.W.*2d 437, 457 (1980); *Model Uniform Prod. Liab. Act* § 120(A), *discussed in* 44 *Fed.Reg.* 62,748 (1979). If society is to have confidence that under the circumstances the sanction is warranted, this standard of proof is necessary in awarding punitive damages.

(3) *Standards and Measures for the Award of Punitive Damages*

Historically, courts have been loath to inquire into the amount of jury verdicts for punitive damages. The inability or unwillingness of courts to deal with standards for punitive damages is a residue of the early history of common law. It was "at comparatively a recent period that the jury has relinquished its control over actions even of contract, and that any approach has been made to a fixed and legal measure of damages." T. Sedgwick, *A Treatise on the Measure of Damages* 214 (1847), *quoted in* M. Horwitz, *The Transformation of American Law,*

1780-1860, at 83 (1977). Only by degrees was the principle recognized " 'that the amount of compensation [was] to be regulated by the direction of the court, and that the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down.' " Horwitz, *supra*, at 83 (quoting **[487]** Sedgwick, *supra*, at 214). "The doctrine of exemplary damages is thus seen to have originated in a survival in this limited class of cases of the old arbitrary power of the jury." 1 T. Sedgwick, *A Treatise on the Measure of Damages* § 349, at 689 (9th ed. 1912). Appellate records are replete with evidence that judges desperately seek guidance on this issue in instructing juries. Note, *Exemplary Damages in The Law of Torts, supra*, 70 *Harv.L.Rev.* at 529-30; *see also* Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 *Ind.L.Rev.* 668, 672 (1975) (lack of ascertainable standards responsible for reluctance of courts to interfere with punitive damages awards). I believe that guidance can be given to juries in their instructions. Instructions can include identification and examination of the recurring forms of marketing misbehavior that have been considered most deserving of punishment, such as fraudulent misconduct, knowing violations of safety standards, inadequate testing and manufacturing procedures, and failure to warn of known dangers before marketing as well as post-marketing failure to remedy known dangers. *See* Owen, *Punitive Damages In Products Liability Litigation, supra*, 74 *Mich.L.Rev.* at 1329-52, 1369-70.

In addition to marketing misbehavior, juries should balance society's interests against the defendant's interests. Factors to consider include the severity of threatened harm, the degree of reprehensibility of defendant's conduct, the profitability of the conduct, the financial condition of the enterprise, the amount of compensatory damages assessed, the cost of litigation, the potential criminal sanctions, and other civil actions against the defendant based on the same conduct.

In this way, trial courts could give greater content to the framework within which a jury should assess punitive damages. The jury should be instructed about the purposes of the doctrine, which do not include giving plaintiffs a windfall; that in

products-liability cases recovery of punitive damages should be based upon the extent to which the manufacturer's marketing conduct exhibits a conscious or reckless indifference to the risk that its product may be excessively dangerous to consumers; that the jury's imposition of sanctions should serve to shape the manufacturer's conduct to reflect its concern for human values without diminishing the utility of the mass-produced merchandise. Furthermore, one of the underlying, unwritten premises of awarding punitive damages is that plaintiffs are often undercompensated by compensatory damages. Expenses of litigation, counsel fees, and expert fees are extremely high and burden plaintiffs. A candid recognition of this issue would be consistent with reality. Finally, some consideration of the relationship of an award of punitive damages to an award of compensatory damages is appropriate and should be brought to the jury's attention. *Nappe, supra*, 97 *N.J.* at 55-57 (O'Hern, J., concurring).

(4) *Management of Punitive Damages in Multi-Party Litigation*

The remaining issue, although not raised below, concerns how to resolve the problem of punitive damages in multiple-lawsuit, multi-party litigation. The basic principles of justice—that claimants be treated fairly, that litigation must come to an end, and that a party cannot be repeatedly sued on the same cause of action—are violated by excessive multiple punishments.

Punitive damages may be inappropriate in situations where numerous plaintiffs file suit against the same defendant for damages arising out of a single "mass disaster." Long, *Punitive Damages: An Unsettled Doctrine*, 25 *Drake L.Rev.* 870, 887 (1976). First, one plaintiff can collect a substantial award, thereby affecting another who may be equally deserving of such an award. Second, punitive damages are to "reflect the total penalty which must be imposed to punish and deter the defendant." *Bartolo v. Boardwalk Regency Hotel Casino, Inc.*, 185 *N.J.Super.* 534, 545 **[488]** (Law Div.1982) (citing *Leimgruber v. Claridge Assoc., supra*, 73 *N.J.* at 454). Third, courts should

not relitigate identical issues or inflicted repeated punishment for the same offense. Finally, by determining punitive damages on a case-by-case basis, courts are consuming their judicial resources.

In order to avoid such problems, whenever possible, all punitive-damages claims should be pursued together in one class action. *See* Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 *U.S.F.L.Rev.* 1, 29-31 (1981); *see also* Morris, *Punitive Damages in Tort Cases*, 44 *Harv.L.Rev.* 1173, 1194 (1931) ("When a defendant's conduct results in harm to more than one plaintiff there are no difficulties if there is but one suit"); *Roginsky v. Richardson-Merrell, Inc.*, *supra*, 378 *F.2d* at 839-40 n. 11. ("If there were any way in which all cases could be assembled before a single court * * * it might be possible for a jury to make one award to be held for appropriate distribution among all successful plaintiffs").[3]

Such a resolution would call for a court to play a more active role in the management of complex multi-party litigation of this type. It is simply impossible for a legal system to approach these problems in the way in which it previously considered lawsuits between individuals. *See, e.g.*, Rosenberg, *The Casual Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 *Harv.L.Rev.* 849, 852 (1984) (if "complex damage actions against manufacturers of toxic agents are tried

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3 Those courts that have resisted class-action remedies have basically been involved with cases that present problems of different laws not resolvable in one forum. The rights of a Dalkon-Shield-IUD victim in California may differ from the rights of one in Iowa. *In re Northern Dist. of Calif., Dalkon Shield IUD Prods. Liab. Litig.* 693 *F.*2d 847, 852-54 (9th Cir.1982), *cert. denied sub nom. A.H. Robins Co. v. Abed*, 459 *U.S.* 1171, 103 *S.Ct.* 817, 74 *L.Ed.*2d 1015 (1983). But why, for example, should a few Dalkin Shield users receive several millions in punitive-damages awards, while others receive nothing from the bankrupt A.H. Robins Co.? *See* Sugarman, *Doing Away with Tort Law*, 73 *Calif.L.Rev.* 555, 602 (1985). The *Agent Orange* case demonstrated the feasibility of applying a federal common law in certain situations. *In re "Agent Orange" Prod. Liab. Litig.*, 100 *F.R.D.* 718, 724-26 (E.D.N.Y.1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067, 104 *S.Ct.* 1417, 79 *L.Ed.*2d 743 (1984); *but see In re School Asbestos Litig.*, 789 *F.*2d 996, 1006-07 (3d Cir.1986).

under traditional methods of case-by-case adjudication, they will likely consume hundreds of millions of dollars' worth of public and private resources''); Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 *Cornell L.Rev.* 779, 781-82 (1985) (''The perceived inefficiencies, costs, and delays associated with mass tort litigation have provoked calls for reform * * * ''). Traditionally, courts that adjudicate the rights of many parties to litigation, as in bankruptcy, trusts and estates, or other institutional settings, have undertaken such roles.

The advantages of the class action would be many and varied. A class-action disposition would provide the most practical means of attacking the problems of mass-exposure litigation and punitive-damages claims. It would thus be possible to ''determine the rights of a large group of similarly interested claimants in a single proceeding.'' *See* Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 *Fordham L.Rev.* 37, 63 (1983).

Unlimited multiple punishment for a single act ''determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims * * * would violate the sense of 'fundamental fairness' that is essential to constitutional due process.'' *In Re Federal Skywalk Cases*, 680 *F.*2d 1175, 1188 (8th Cir.1982) (citing *Roginsky v. Richardson-Merrell, Inc., supra*, 378 *F.*2d at 838-41, and Putz & Astiz, *supra*, 16 *U.S.F.L.Rev.* at 29-31). By settling the punitive-damages issue in one proceeding, the defendant's entire liability would be determined, individual class claim-**[489]**ants would receive a fair share of the sanction, and no further litigation of the issue would be needed.

Class actions would promote the legal system's productivity in dealing with mass-exposure litigation. The purpose of class treatment of viable mass-exposure claims would not be to reallocate resources, but rather to conserve them for more productive use by reducing litigation and administration costs, thus awarding more benefits to the victim. *See* Rosenberg, *supra*, 97 *Harv.L.Rev.* at 910.

The majority cites studies that "show that between eleven million and thirteen million workers have been exposed to asbestos." *Ante* at 663. Other studies indicate that in the last forty years, over 21 million Americans have been significantly exposed to asbestos. *See Jackson v. Johns-Manville Sales Corp.*, 750 *F.*2d 1314, 1323 (5th Cir.1985). Not unexpectedly, more money is channelled to the expenses of litigation than to the expenses of the victims for recovery. Costs of adjudication in asbestos litigation total $1.59 to every $1 provided to a victim. Newman, *Rethinking Fairness: Perspectives on the Litigation Process* 7-8 (1984) (Thirty-ninth Benjamin N. Cardozo Lecture) (citing Kakalik, Ebener, Felstiner, Haggstrom & Shanley, *Variation in Asbestos Litigation, Compensation and Expenses* 89, Table 9.3 (Institute for Civil Justice, Rand Corp. 1984)).

As of January 1985, there were approximately 467 pending mass-exposure-asbestos claims in the United States District Court for the District of New Jersey. In the Superior Court of New Jersey there were approximately 1,316 personal-injury claims represented in 392 docketed asbestos cases venued in Middlesex County alone. Obviously, some of these docketed cases will be adjudicated before others. The class action would be fairer to all victims. Since punitive damages awarded in prior suits are a factor to be considered in determining the amount of such damages, *Bartolo v. Boardwalk Regency Hotel Casino, Inc., supra*, 185 *N.J.Super.* at 545 (citing 4 *Restatement (Second) of Torts* § 908 comment (e) (1979)), early litigators will be setting the trend by fixing money awards at the risk of victims who recover less later.[4] By allowing a class action in New Jersey, this Court would be promoting judicial economy by centralizing the litigation in the court that will adjudicate those primary issues related to the case. *In re Federal Skywalk Cases, supra,* 680 *F.*2d at 1186. I would not represent that we can undertake to resolve the national problems of asbestos litigation. *See In re School Asbestos Litig.*, 789 *F.*2d 996, 1008 (3d

4 It is naive to assume that manufacturers would want to introduce evidence of this nature in the liability trial. Perhaps the issue can be considered separately or in judicial evaluation of the award.

Cir.1986) (certification of nationwide class of punitive-damages claims related to property losses overruled). I also recognize that individual claimants have an important interest in separate trial of personal claims.

Still, this Court has recognized a duty to deal with mass-exposure litigation. *Beshada v. Johns-Manville Prods. Corp., supra*, 90 *N.J.* 191; *Gold v. Johns-Manville Sales Corp.*, 553 *F.Supp.* 482 (D.N.J.1982). Resolution of mass-exposure litigation can best be achieved by narrowing the issues that must be litigated.

The justifications for imposing punitive damages include deterring outrageous conduct in the future, punishing such conduct, expressing society's disapproval of such outrageous conduct, and providing incentives for private civil enforcement. Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 *Hastings L.J.* 639, 647-50 (1980). Class certification will achieve these goals. In addition, class-action certification will save time and money for the parties and for the public and will help courts to resolve multiple lawsuits and to manage multi-party litigation in the punitive-damages setting.

[490] In this case, because the trial court's charge to the jury was in terms of a mere preponderance of proof that the conduct of Johns-Manville met its test, and did not contain what I believe to be the necessary further definition of the appropriate standards for imposition of punitive damages, the judgment for punitive damages should be reversed and remanded for further proceedings. I would invite consideration of certifying the punitive-damages claims for class disposition.

For affirmance—Justices CLIFFORD, HANDLER and POLLOCK—3.

For reversal—Justices O'HERN and GARIBALDI—2.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 80-2841

Hon. Joseph H. Rodriguez

EDWARD CONLEY,

Plaintiff,

—v.—

GAF CORP., OWENS ILLINOIS INC., H.K. PORTER INC., EAGLE PICHER INDUSTRIES INC., KEENE CORPORATION & Successors, RAYBESTOS MANHATTAN & Successors, PHILLIP CAREY CORP. & Successors, OWENS CORNING FIBERGLAS CORP., PITTSBURGH CORNING CORP.,

Defendants.

VERDICT ON SPECIAL QUESTIONS TO THE JURY

1. Do you find that defendant Raybestos Manhattan/Raymark Industries was negligent and that such negligence was a substantial contributing factor in causing injury to Mr. Conley?

Yes ____ No X

2. Do you find that the asbestos containing products supplied by defendant Raybestos Manhattan/Raymark Industries required warnings or instructions to make them fit, suitable and safe for their intended or reasonably foreseeable uses?

Yes ____ No X

3. Do you find that exposure to the asbestos containing products of any of the defendants was a substantial contributing factor in causing injury to Mr. Conley?

Yes ____ No X

4. If the answer to all of the above questions in no, do not complete the remainder of this form.

If the answer to any of the questions above is yes, what percentage of Mr. Conley's injury is attributable to each defendant?

GAF Corp.	____%
Owens-Illinois	____%
H. K. Porter Inc.	____%
Eagle Picher Industries	____%
Keene Corp.	____%
Raybestos Manhattan	____%
Phillip Carey	____%
Owens Corning Fiberglas	____%
Pittsburgh Corning	____%
	100%

5. Specify the amount of money in one lump sum that will fairly and adequately compensate Mr. Conley for his injury, including pain and suffering and emotional distress.

$ _____

6. Do you find that the conduct of defendant Raybestos Manhattan/Raymark Industries was sufficiently egregious to warrant an award of punitive damages against it?

Yes ____ No ____

7. If the answer to question 6 above is yes, in what amount do you fix such damages?

$ _____

8. At what amount do you fix the cost of monitoring Mr. Conley's health in the future?

$ _____